



**NEEDED WEAPONS IN THE ARMY'S WAR ON
DRUGS: ELECTRONIC SURVEILLANCE AND
INFORMANTS**

Captain Timothy A. Raezer

**INTERNATIONAL LEGAL IMPLICATIONS OF
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NEEDED WEAPONS IN THE ARMY'S WAR ON DRUGS: ELECTRONIC SURVEILLANCE AND INFORMANTS

by Captain Timothy A. Raezer*

I. INTRODUCTION

After a thorough study of the nation's drug problem, the President's Commission on Organized Crime recently concluded that,

Ultimately, the curse of drug abuse **will** be broken, but only by a nationwide dedication to persistent and unyielding assaults on both supply and demand. The supply is already under siege. . . . Because an end to consumption is our ultimate goal, it is a concerted and direct attack on demand that must be mounted.¹

Unlike the civilian sector, the Army's war on drugs has continually focused on the demand for drugs and used the military inspection as a primary weapon for eliminating drug abuse.

In the past, these inspections were often highly intrusive invasions into the soldier's privacy, and became known as "shakedown inspections"² or "full-court presses."³ They included an examination not only of the soldier's property and living area, but also his person, to include the most private body cavities.

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¹President's Commission on Organized Crime, Report to the President and the Attorney General, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime 12 (1986)[hereinafter America's Habit: Drug Abuse].

²United States v. Roberts, 2 M.J. 31 (C.M.A. 1976).

³Committee for G.I. Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974), *rev'd*, 518 F.2d 466 (D.C. Cir. 1975).

Today, military inspections for contraband drugs continue unabated,* and now include such aids as drug detection dogs and mandatory urinalysis.

The increased use of urinalysis since 1982 has meant greater intrusion into the soldier's privacy, with the soldier exposing private parts and engaging in urination in the presence of a superior.⁵ Although urinalysis inspections have been upheld as reasonable under the fourth amendment,⁶ this dragnet-type approach results in a significant invasion of the privacy of not only suspected drug users, but also of innocent and unsuspected soldiers.

The repeated justification for this extensive invasion of the innocent soldier's privacy has been that drug offenses are different, especially in the military.⁷ Indeed, their harmful effects on combat readiness cannot be overstated.* Due to their different nature, traditional law enforcement methods have failed to stem fully the growing tide of drug abuse. Generally, drug offenses are committed in secrecy and are victimless crimes. There are no complaining witnesses to notify the military police of the offense. In addition, dangerous narcotics come in small packages that can easily be secreted in a person's private body cavities. Drug dealers are also highly insulated in their dealings and are suspicious of strangers. As a result, drug distribution networks are difficult to penetrate even through undercover investigations. For all these reasons, traditional methods have been inadequate and inspections and, in particular, urinalysis, have been an important answer to the Army's drug problem.

*Mil. R. Evid. 313(b).

⁵Dep't of Army, Reg. No. 600-85, Alcohol and Drug Abuse Prevention and Control Program (3 Nov. 1986). Army Regulation 600-85 implemented Deputy Secretary of Defense Memorandum, subject: Alcohol and Drug Abuse, Dec. 28, 1981 (commonly known as the "Carlucci Memorandum"), which authorized the use of urinalysis in disciplinary proceedings. *See also* Dep't of Defense Directive No. 1010.1, Drug Abuse Testing Program (Dec. 28, 1984). Direct observation of civilian employees is more limited, absent evidence that a particular individual may substitute or alter a urine specimen. Message, Dep't of Army, DAPE-HRL, 1012362 Oct. 1986, subject: Civilian Urinalysis Program.

⁶*Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

⁷*Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *United States v. Trotter*, 9 M.J. 337 (C.M.A. 1980).

⁸Recent studies indicate that even marijuana is not a harmless drug. *See* Institute of Medicine, *Marijuana and Health* (1982); National Acad. of Sciences, Committee on Substance Abuse and Habitual Behavior, *An Analysis of Marijuana Policy* (1982); National Inst. of Drug Abuse, *Research Monograph 31, Marijuana Research Findings: 1980* (1980).

Urinalysis has had a significant impact in reducing drug use in the military. According to a recent survey, drug use in the Army has dropped from a high of **29** percent in **1980**, to **26.2** percent in **1982**, to a current low of 11.5 percent.⁹ Nevertheless, the Army still has the highest current level of drug use among any of the **services**,¹⁰ and the level of drug abuse among soldiers still remains high. Additionally, ominous clouds are appearing on the horizon in the civilian sector. The National Institute of Drug Abuse (NIDA) sponsored a survey by the University of Michigan's Institute for Social Research that involved **16,000** high school seniors across the country. The survey was generally based on the seniors' drug use within the past month. It showed a recent increase in drug abuse, especially cocaine.¹¹ Overall drug use among the seniors increased from twenty-nine to thirty percent. The most widely used illicit drug was marijuana, tried by fifty-four percent of the seniors. Cocaine had been tried by seventeen percent of the seniors. This study is significant to the military, because today's high school seniors are tomorrow's soldiers.

The Drug Enforcement Administration's (DEA) study, entitled *Narcotics Intelligence Estimate 1984*, indicated that, in **1984**, cocaine consumption rose eleven percent and the use of stimulants, hallucinogens, depressants, sedatives, and other man-made substances increased fifteen percent.¹² The rise in cocaine use is of

@ArmyTimes, Feb. **24**, **1986**, at **3**, col. 1. To gather these figures, civilian contractors surveyed about **20,000** service members worldwide. The survey was based on whether the service member had used illicit drugs within the last 30 days. Army drug testing laboratories also report that the percentage of positive samples tested has dropped from **9.8%** in **1983** to **5.9%** in **1985**. Army Times, Oct. **28**, **1985**, at **26**.

¹⁰*Id.* The Air Force level of drug use was the lowest and stood at **4.5%**, followed by the Marine Corps at **9.9%**, and the Navy at **10.3%**.

¹¹A copy of the final report of the NIDA-sponsored study is available free from the National Clearinghouse for Drug Abuse Information (NCDAI), **P.O. Box 416**, Kensington, Maryland **20795**; telephone **(301)443-6500**. The President's Commission on Organized Crime was critical of the study for not including high school dropouts, who may provide a high percentage of users, as well as the study's failure to ask questions concerning the price and quantity of the illicit drugs used. America's Habit: Drug Abuse, *supra* note 1, at **339**.

NIDA research also includes a periodic national survey of drug use in the household population (the National Survey on Drug Abuse), and a nationwide drug abuse monitoring system in hospital emergency rooms in smaller cities across the United States. This statistical system is known as the Drug Abuse Warning Network (DAWN) and is designed to detect trends that may be a danger to public health.

¹²Drug Enforcement Admin., National Narcotics Intelligence Consumers Committee, *Narcotics Intelligence Estimate 1984*, at **7**. Free copies of this report may be obtained from the Office of Public Affairs, Drug Enforcement Administration, 1405 Eye Street, N.W., Washington, D.C. **20537**; telephone **(202)633-1333**.

particular concern, because this drug rapidly metabolizes and is cleansed from the body within forty-eight hours.¹³ As a result, its use on a Friday night would not be detected by a urinalysis on Monday morning.

Another continuing problem is the connection between drug abuse, particularly heroin addiction, and the commission of other crimes. These other crimes consist of more than just property crimes and drug sales committed to support a habit. NIDA's most recent report to Congress reached the following conclusion:

The violence that permeates the drugabusing community is becoming increasingly evident. In cities where homicide data are collected at the precinct rather than the city level, many homicides that once would have been classified as unrelated to drugs are now being classified as drug related. This is because police officers and detectives most familiar with the criminal underworld in their part of the city are able to link the homicide victims with the role they play in drug trafficking. Simply put, drugs such as marijuana, heroin, and cocaine are illegal contraband. Their distribution occurs under clandestine conditions for what often are massive profit margins. As a result, violence is a regular part of the drug trafficking business. The violence connected with drug abuse threatens the health and safety of our nation.¹⁴

The exact relationship of drug abuse to barracks assaults and larcenies in the military remains speculative, but may well be an overlooked motive to these other crimes.

Another cause for concern over drug abuse is its relationship to the spreading disease of Acquired Immune Deficiency Syndrome (AIDS). Initial reports and studies that attributed the spread of the disease mostly to homosexual relationships may have overlooked the fact that many of the homosexuals were also intravenous drug users who shared needles.¹⁵ As a result, the number of persons contracting the disease through intravenous drug use may be underestimated.

¹³National Inst. of Drug Abuse, Research Monograph 50, Cocaine: Pharmacology, Effects, and Treatment of Abuse 39-44 (J. Grabowski ed. 1984).

¹⁴"Secretary, Dep't of Health and Human Services, Drug Abuse and Drug Abuse Research, The First in a Series of Triennial Reports to Congress 28 (1984). Free copies may be obtained from NCDAL. See *supra* note 11; see also America's Habit: Drug Abuse, *supra* note 1, at 39 n.53.

¹⁵16 Drug & Drug Abuse Educ. Newsletter 81-83 (Sept. 1985).

For the above reasons, as well as the traditional reasons of maintaining a combat-ready Army capable of providing for the national defense, the Army must remain vigilant in its efforts to totally eradicate drug abuse. Urinalysis has provided an effective method of detection and is a clear deterrent to illegal use. Nonetheless, urinalysis is not without costs in terms of the privacy of innocent soldiers. Moreover, urinalysis cannot detect every drug that has the potential for abuse. Most notably, the military drug testing laboratories cannot detect lysergic acid diethylamide (**LSD**).¹⁶ And, as noted, the weekend user of the increasingly popular cocaine may go undetected. Finally, urinalysis cannot detect the on-post **drug** dealer.

Although much can be said for the argument that without users there would be no dealers, the opposite is also true: without dealers there would be no users. Therefore, any successful attack on drug abuse must go after the demand as well as the supply. Drug users cannot be excused, because their use financially supports the dealers. Accordingly, a balanced approach of punishing both users and dealers, as well as providing education to prevent drug abuse and giving treatment to rehabilitate those with potential to be good soldiers, promises to be the most successful.¹⁷

¹⁶R. Foltz, A. Fentiman & R. Foltz, **GC/MS Assays For Abused Drugs In Body Fluids** (1982). Urinalysis also does not detect intoxication, but merely past **use**. *Id.*

"Certain other assumptions and biases of the author should be revealed at this point. First, arguments favoring legalization of marijuana or any other illicit substance have no validity in either the military setting or civilian society. Those favoring legalization have generally felt that the matter of drug use is one of personal choice. In particular, they wrongly believe that marijuana is no more harmful than cigarette smoking or alcohol consumption. However, even conservative commentators, such as William F. Buckley, have come out in favor of legalization. Buckley, *Legalization of Drugs*, Washington Post, Apr. 1, 1985, at A1, col. 3. The reason is the belief that the drug problem **is** caused by the big demand for their use. By making drugs illegal, the price is driven **up**, and the results are not only a large uncontrollable drug problem, but also a big crime problem and a huge export of capital out of the United States. Legalization would keep the price low and result in savings in drug enforcement.

On the other hand, as Dr. William Pollin, former chief of NIDA, has **noted**, legalization would cause greater availability and increased addiction, which would **also** have serious economic consequences in terms of treatment and lost productivity in the workplace. Raspberry, *And if Drugs Were Legal*, Washington Post, Apr. 3, 1985, at A23, col. 1. For other arguments by noted commentators, **see** Note, *Legalization Debate*, 16 *Drug & Drug Abuse Educ. Newsletter* 76 (Aug. 1985).

Second, education and treatment, though necessary and **useful**, are not alone sufficient to eradicate drug abuse. As an example, 60 million cigarette smokers in the United States continue to smoke, even though they know that smoking can cause cancer and death. Raspberry, *And if Drugs Were Legal*, *supm.*

The Army follows a balanced approach for the most part. Nevertheless, greater use needs to be made of electronic surveillance and informants as investigative techniques. Together, these methods make an effective weapon in tracking down drug dealers and determining the full extent of drug conspiracies. Although the Army is ahead of the civilian sector in effectively using urinalysis, it has fallen behind it in employing these techniques.

This article explores the extent to which federal and state courts have come to accept the use of informants and electronic surveillance in drug investigations. These courts have recognized that the special nature of drug offenses requires the use of these methods, along with the government's employment of deception and stratagems. Particular attention is, therefore, focused on the value of using "wired" informants and "reverse sting" operations. This article advocates vesting approval authority for "wired" informants and "reverse sting" operations in the **U.S. Army Criminal Investigation Command**. Finally, the article urges increased recruiting, rewarding, using, and protecting of informants as a necessary means of penetrating drug conspiracies in the Army. This recruiting should include a regulation requiring all Army personnel to come forward and report known drug offenses of others.

The scope of this article is limited to the Army's war against drug abuse by its own soldiers. It does not cover the Army and the other military services' role in assisting civilian authorities in their drug suppression and interdiction efforts against civilian criminal elements. Nevertheless, the extent to which military authorities may employ electronic surveillance and informants off-post against suspected civilian drug offenders who deal with soldiers deserves a brief description before examining in detail the use of these weapons in drug investigations.

Almost every involvement by a soldier with illicit drugs is subject to court-martial jurisdiction, even if the soldier at the time he commits the offense is on leave and far away from any military installation.¹⁸ The rationale for this extended assertion of jurisdiction over off-post drug offenses, beyond that which would exist

¹⁸*Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Trotter*, 9 M.J. 337 (C.M.A. 1980); *United States v. Brown*, 19 M.J. 826 (N.M.C.M.R. 1985); *United States v. Frost*, 19 M.J. 502 (A.F.C.M.R. 1984). *But see* *United States v. Barideaux*, 22 M.J. 60 (C.M.A. 1986) (No court-martial jurisdiction over off-post drug offense when accused was on terminal leave, in a civilian community some distance away from any military installation, and had no reason to believe that any military members were involved in the transaction).

for other equally serious offenses, is the deleterious effect of drugs upon military readiness.¹⁹ Because court-martial jurisdiction exists over the soldier's off-post drug offenses, the military has the authority to investigate these offenses.²⁰

A problem, however, arises when these off-post offenses also involve civilians. The Posse Comitatus Act of 1878²¹ generally prohibits the military from enforcing civilian laws. Recent changes to the Act permit the military to provide criminal information,²² equipment and facilities,²³ training, and expert advice²⁴ to civilian law enforcement personnel. Nevertheless, the Act remains unclear on the extent to which military law enforcement officials may investigate civilians engaged in illicit off-post drug activity.²⁵

The Department of Defense has recently provided clear policy guidance in this area.²⁶ Military criminal investigators may investigate civilians who they reasonably believe are engaged in the commission of drug offenses with soldiers.²⁷ They may also investigate civilians who they reasonably believe are the immediate source of drugs introduced onto the military installation.²⁸ This policy guidance expressly permits the use of undercover military investigators and informants to make controlled buys from these civilian drug dealers.²⁹ Presumably, this investigation could also include the use of consensual and nonconsensual electronic surveillance when properly authorized. The military investigators may also participate in joint investigations with civilian law enforcement officials for the purposes mentioned

¹⁹*Trotter*, 9 M.J. at 346.

²⁰Dep't of Defense Directive No. 5525.7, Implementation of Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes, para. C.3 (Jan. 22, 1985) [hereinafter DOD Dir. 5525.7]. Some military prosecutors do have authority to try civilians who commit on-post misdemeanor drug offenses, in federal magistrate's court. 18 U.S.C. § 3401 (1982).

²¹18 U.S.C. § 1385 (1982). This statute provides that "whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

²²10 U.S.C. § 371 (1982).

²³10 U.S.C. § 372 (1982).

²⁴10 U.S.C. § 373 (1982).

²⁵Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 Mil. L. Rev. 109, 127-135 (1984).

²⁶Dep't of Defense, Inspector General Memorandum, subject: Criminal Investigations Policy Memorandum Number 5—Criminal Drug Investigative Activities, Dec. 17, 1985 [hereinafter Inspector General Memorandum].

²⁷*Id.* at 3.

²⁸*Id.*

²⁹*Id.*

above.³⁰ Under no circumstances, however, may military investigators apprehend or search civilians engaged in off-post drug dealings.³¹

The expansion of the military investigator's authority enhances the value of electronic surveillance and informants in the Army's war on drugs. At the point the Army's investigation proceeds beyond the immediate source, the information gathered can be furnished to civilian authorities.³² They, in turn, can use this information as probable cause to obtain court approval for further electronic surveillance or for searches and arrests, as well as for setting up other undercover operations. This type of cooperative investigation can uncover the drug kingpins, and cut off the supply of drugs at its source, thereby increasing the likelihood that this problem will not recur.

11. ELECTRONIC SURVEILLANCE

A. BACKGROUND

The history of electronic surveillance has been a tortuous struggle between the needs of law enforcement authorities to combat the growing threat of organized crime and the need to protect the privacy of law-abiding citizens from increasingly sophisticated electronic listening devices. Complicating this struggle was the extreme distaste that many prominent Supreme Court Justices had toward eavesdropping. In the first case upholding wiretapping, *Olmstead v. United States*,³³ Justices Brandeis, Holmes, Butler, and Stone wrote vigorous dissents.³⁴ Justice Holmes referred to wiretapping as a "dirty business." Over the years the dissenters continued and were joined by other notable Justices, to include Frankfurter and Douglas. One of the dissenters' favorite quotes was from Blackstone's Commentaries, which listed eavesdropping as an indictable offense at common law:

Eaves-droppers, or such as listen under **walls** or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet: or

³⁰*Id.* at 4.

³¹*Id.*

³²10 U.S.C. § 371 (1982).

³³277 U.S. 438 (1928).

³⁴*Id.* at 471 (Brandeis, J., dissenting); at 469 (Holmes, J., dissenting); at 485 (Butler, J., dissenting); at 488 (Stone, J., dissenting).

are indictable at the sessions, and punishable by fine and finding sureties for their good behavior.³⁵

The dissenters felt that any use of electronic surveillance would inevitably lead to complete police omniscience and the coming of "Big Brother."³⁶ They considered the fact that eavesdropping was done to aid effective law enforcement to be immaterial.³⁷

With these growing fears, the Supreme Court slowly reached the conclusion that, even though **all** electronic surveillance would not be banned, its permissible use would be narrowly circumscribed. In the landmark decision of *Berger v. New York*,³⁸ the Court struck down a New York statute authorizing the ex parte issuance of eavesdropping orders because it was too broad to meet fourth amendment requirements.³⁹ From this case and **others**,⁴⁰ lower courts gleaned the following requirements:

(1) that the applicant procure "from a neutral and detached authority," . . . , an order permitting the wire-tap; (2) that to procure the order, or renewal thereof, the applicant must show probable cause that an offense has been or is being committed and must state with particularity (3) the offense being investigated, (4) the place being searched (i.e., the telephone being tapped or place being bugged), and (5) the things (conversations) to be seized; (6) that the order must be executed with dispatch; (7) that it must not continue beyond the procurement of

³⁵4 Blackstone's Commentaries 168, *quoted in* *Lopez v. United States*, 373 U.S. 427, 466 n.13 (1963) (Brennan, J., joined by Douglas and Goldberg, JJ., dissenting).

"This fear is illustrated in Justice Brandeis' dissent in *Olmstead*:

Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate Occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions.

277 U.S. at 474; *see also* Justice Brennan's dissent in *Lopez*: "Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny." 373 U.S. at 466. Cf. G. Orwell, 1984 (1949).

³⁷*See, e.g., Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting). This article deals only with forms of electronic surveillance that enable investigators to listen to and record conversations. It does not consider the use of "beepers" or other electronic measures that merely mark the location of a person or object. *See, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983).

³⁸388 U.S. 41 (1967).

³⁹*Id.*

⁴⁰*Katz v. United States*, 389 U.S. 347 (1967); *Osborn v. United States*, 385 U.S. 323 (1966).

the conversation sought and thereby become "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause;" (8) that it overcome the lack of notice by requiring a showing of exigent circumstances as a precondition to the order; and (9) that it require a return on the warrant.⁴¹

Congress also incorporated these requirements for permissible electronic surveillance into Title III of the Omnibus Crime Control and Safe Streets Act of 1968.⁴²

Title III provides a comprehensive and detailed scheme for regulating the interception of wire and oral communications. It prohibits **all** interceptions of wire and oral communications unless otherwise authorized by this federal statute.⁴³ The statute even reaches the conduct of a private person intercepting the communications of other private parties.⁴⁴ The provisions of Title III have been consistently upheld as meeting the requirements of the fourth amendment.⁴⁵ It safeguards against unwarranted intrusion into the individual's right to privacy by establishing detailed prerequisites that law enforcement authorities must meet in order to obtain a court order to conduct nonconsensual electronic surveillance.⁴⁶ As an enforcement mechanism, Title III sets forth criminal sanctions for unauthorized surveillance,⁴⁷ as well as a basis for civil damage suits by aggrieved **persons**.⁴⁸ Further enforcement is achieved through a statutory exclusionary rule.⁴⁹

Despite this statutory authorization, the Army has not fully availed itself of the legitimate investigative benefits to be derived from conducting electronic surveillance, especially in drug cases. One reason for this lack of use is the nature of drug offenses in the military. **Drug** offenders in the Army *are* usually youthful small-time users and dealers. On the other hand, Title III was primarily intended to permit use of electronic surveillance to combat organized crime. This reason for not using electronic surveillance is not entirely valid in the Army, however, because what may be considered a minor offense to the civilian sector may

⁴¹United States v. Cox, 462 F.2d 1293, 1302-03 (8th Cir. 1972).

⁴²18 U.S.C. §§ 2510-2520 (1982).

⁴³*Id.*

⁴⁴The commerce clause of the Constitution provided Congressional authority to legislate intrastate communication intercepted by private parties. J. Carr, *The Law of Electronic Surveillance* § 2.03[2], at 25 (1977).

⁴⁵*Id.* § 2.05[2], at 33 n.117 and the cases cited therein.

⁴⁶18 U.S.C. § 2518 (1982).

⁴⁷*Id.* § 2511.

⁴⁸*Id.* § 2520.

⁴⁹*Id.* § 2518(10).

be very serious when committed in a military unit. No doubt another reason for its lack of use is the administrative burden of obtaining Justice Department approval and then a court order; a burden too onerous, especially for Army installations overseas.

Finally, perhaps the Army has been reluctant to conduct electronic surveillance because of the public's perception that it had abused this technique in the past. In *Laird v. Tatum*,⁵⁰ the Army's intelligence gathering and surveillance of domestic political groups prone to civil disturbances was closely scrutinized for possible first amendment infringements. Although the majority of the Court did not judge the propriety of the Army surveillance activities,⁵¹ the dissenting Justices were extremely critical.⁵² Later, in *Berlin Democratic Club v. Rumsfeld*,⁵³ the Army was embarrassed by a suit for damages arising out of warrantless wiretaps conducted against American citizens living abroad. Both these cases gave the appearance that the Army was interested in electronic surveillance as a means to control political speech.

Whatever the reason, the Army has failed to take full advantage of electronic surveillance as an investigative tool to uncover the illicit drug trade. This failure has occurred at a time when the Supreme Court and lower courts are becoming increasingly receptive to the need to use electronic surveillance in drug investigations. As a result, the administrative burden has become less onerous in obtaining nonconsensual wiretaps⁵⁴ and bugs.⁵⁵ Even more significantly, the courts are willing to accept the use of consensual electronic surveillance or wired informants without any judicial preconditions or controls.

⁵⁰408 U.S. 1 (1972).

⁵¹*Id.* at 15.

⁵²*Id.* at 16. As Justice Douglas castigated:

The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people . . . There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every non-conformist's shoulder in the library or walks invisibly by his side in a picket line or infiltrates his club, the America once extolled as the voice of liberty heard around the world no longer is cast in the image which Jefferson and Madison designed, but more in the Russian image.

Id. at 28.

⁵³410 F. Supp. 144 (D.D.C. 1976).

"Wiretapping is the interception of wire communications, most frequently telephone communications. See J. Carr, *supra* note 44, § 1.01[1][a], at 2.

"Bugging is the use of a miniature electronic device that overhears, broadcasts or records a speaker's conversation. *Id.* § 1.01[1][a], at 2-3.

B. CONSENSUAL INTERCEPTIONS: THE WIRED INFORMANT

Although a strong aversion to eavesdropping, wiretapping, and nonconsensual electronic surveillance has always existed, the courts have continually and almost uniformly held that, when one party to a conversation consents to electronic surveillance, the fourth amendment is not implicated, and probable cause and a warrant are not required. The Supreme Court first ruled on the constitutionality of wired informants in *On Lee v. United States*.⁵⁶

Federal Bureau of Narcotics agents suspected the defendant, On Lee, of selling opium from his laundry. On Lee, however, would not deal with strangers so the agents placed a small microphone in the overcoat pocket of Chin Poy, who was an old friend and former employee of On Lee. The agents were outside the laundry with a receiving set to overhear On Lee's conversations with Chin Poy. After entering the laundry with On Lee's permission, Chin Poy engaged On Lee in an incriminating conversation that was overheard through the transmitting device by the agents outside. On Lee was later convicted of selling opium based on the agent's testimony of the conversation; Chin Poy, who was of dubious character, was not called as a witness.⁵⁷

The Court upheld this procedure as not violative of the fourth amendment because there was no physical trespass onto On Lee's property. Chin Poy was, in fact, an invited guest. In making this ruling, the Court relied upon *Olmstead v. United States*⁵⁸ and *Goldman v. United States*.⁵⁹ In *Olmstead*, the Court had held that the fourth amendment did not ban the interception of telephone communications if the wiretap was installed outside the home and no physical trespass occurred.⁶⁰ Likewise, in *Goldman* the use of a detectaphone (a delicate receiver with an amplifier), placed against the wall of an adjoining office and used to overhear incriminating conversations in the next office room, did not violate the fourth amendment because again there was no physical trespass into the defendant's office.⁶¹

⁵⁶343 U.S. 747 (1952).

⁵⁷*Id.* at 749.

⁵⁸277 U.S. 438 (1928).

⁵⁹316 U.S. 129 (1942).

⁶⁰*Olmstead*, 277 U.S. at 457.

⁶¹*Goldman*, 316 U.S. at 135.

The Court reaffirmed the one-party consent rule as applied to telephone communications in *Rathbun v. United States*,⁶² where police officers listened to an incriminating conversation on an extension phone. Chief Justice Earl Warren explained:

Common experience tells us that a **call** to **a** particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to **a** telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain.⁶³

Again, no physical trespass onto the defendant's property had occurred.

Chief Justice Warren's rationale was relied upon in *Lopez v. United States*,⁶⁴ where the defendant was convicted of attempted bribery of **an** internal revenue agent. The agent, whom the defendant had previously attempted to bribe, decided that, in order to protect **his** reputation for truthfulness, he would place a secret bug on his person and record the defendant's bribery attempts. Relying on the trespass doctrine, the Court held that, because the agent entered defendant's office with the defendant's consent, no fourth amendment violation occurred. The Court further found the case did not involve any eavesdropping because the Government did not use electronic surveillance to listen to a conversation it could not otherwise have heard and testified to in court.⁶⁵ The Court then elaborated upon Chief Justice Warren's rationale in *Rathbun*:

Stripped to its essentials, petitioner's [Lopez's] argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment We think the risk petitioner took in offering a bribe fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.⁶⁶

⁶²355 U.S.107 (1957).

⁶³*Id.* at 111.

⁶⁴373 U.S.427 (1963).

⁶⁵*Id.* at 439.

⁶⁶*Id.*

The Court was now developing a rationale separate from the trespass doctrine to permit warrantless electronic surveillance of conversations where one of the parties to the conversation consents.

In 1967, however, these cases were called into question with the Court's landmark decision of *Katz v. United States*.⁶⁷ Here again, no physical trespass or penetration occurred when FBI agents attached a sensitive electronic listening and recording device on the outside of a public telephone booth that Katz used to conduct an illegal gambling business. The Court held that the seizure of Katz's telephone conversations was illegal under the fourth amendment. The court explained that "the Fourth Amendment protects people, not places."⁶⁸ The fact that there was no physical trespass was without constitutional significance. The Court overruled *Olmstead* and *Goldman*, which were based on the trespass doctrine,⁶⁹ but did not address what effect *Katz* would have on *On Lee*, *Rathbun*, and *Lopez*,

A year later, in 1968, Congress passed Title III and exempted from the probable cause, warrant, and other statutory requirements the interception of communications where one party consents to the conversation. Section 2511(2) provides:

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.⁷⁰

⁶⁷389 U.S. 347 (1967).

⁶⁸*Id.* at 351.

⁶⁹*Id.* at 353, where the Court stated: "we conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."

⁷⁰18 U.S.C. § 2511(2)(c) and (d) (1982), as amended by Electronic Communications Privacy Act of 1986, Pub.L. 99-508, §§ 101(b)(2), (c)(1)(A), 100 Stat. 1848 (1986).

The phrase "under color of law" in subsection (c) includes not only law enforcement officials, but also confidential informants acting on behalf of the Government.⁷¹ Subsection (d) applies to consensual surveillance by private parties. From both of these provisions, it is clear that Congress thought that, with one party's consent, the interception of communications was constitutional without a warrant, and that *On Lee* and its progeny were still good law. This issue was finally laid to rest in *United States v. White*.⁷²

White was convicted of several illegal narcotics transactions based upon evidence obtained through electronic surveillance conducted with the consent of the confidential informant, Jackson. Government agents were able to overhear several of White's incriminating conversations, including those that occurred in White's home, by use of a radio transmitter concealed on Jackson's person.⁷³ Jackson could not be located for trial, but the agents were permitted to testify about the overheard conversations. The Supreme Court upheld the admissibility of this testimony and stated that *Katz* did not overrule *On Lee* and its progeny. The use of electronic surveillance in this case was upheld on the separate and distinct legal theory of a party's consent, which had developed in these earlier cases. This theory was based upon the premise that the defendant did not have a reasonable expectation of privacy that the person with whom he spoke would keep the conversation secret. Because a party to a conversation can reveal it without violating the defendant's expectation of privacy, the consenting party's recording or transmitting of that conversation, likewise, does not violate the defendant's reasonable expectation of privacy. In short, a person assumes the risk that the other party to a conversation will reveal, transmit, or record it.⁷⁴

The Court of Military Appeals adopted *White* and *Lopez* in *United States v. Samora*.⁷⁵ Airman Samora sold marijuana to a wired confidential informant in a barracks hallway at Wiesbaden Air Force Base in Germany. The court held that the informant's secret recording of the transaction did not violate Samora's reasonable expectations of privacy, and further, that the fourth

⁷¹*United States v. Shields*, 675 F.2d 1152 (11th Cir. 1982); *United States v. Marcello*, 508 F. Supp. 586 (E.D. La. 1981), *aff'd*, 703 F.2d 805 (5th Cir. 1983).

⁷²401 U.S. 745 (1971).

⁷³*Id.* at 747.

⁷⁴*Id.* at 751.

⁷⁵6 M.J. 360 (C.M.A. 1979).

amendment was in no way implicated.⁷⁶ In spite of this green light from the courts, the Army has conducted relatively few consensual interceptions in drug cases.⁷⁷

Before examining the advantages of consensual electronic surveillance and the possible reasons for its lack of use in the Army, ~~some~~ other legal points about its use should be made. First, only two states have rejected the rationale of *White* and have held that their state constitutional rights to privacy require the consent of ~~all~~ the parties to the communication.⁷⁸ The fact that state constitutions or statutes provide individuals with greater privacy rights, however, does not prevent federal or military investigators from lawfully conducting electronic surveillance under federal law even where they are in violation of state law.⁷⁹ Second, the courts have consistently held that the consent of informants to electronic surveillance is not vitiated by the fact that they are promised leniency by law enforcement ~~officials~~,⁸⁰ that they have been granted ~~immunity~~,⁸¹ that they are pending criminal ~~charges~~,⁸² or that they have been paid for their cooperation.⁸³ Evidence must

⁷⁶*Id.* at 362.

⁷⁷Only seven consensual interceptions in drug cases were conducted by the Army during a one-year period ending October 1985. Interview with M. Wesley Clark, Attorney Advisor, Office of the Staff Judge Advocate, U.S. Army Criminal Investigation Command, Falls Church, Va. (Jan. 8, 1986). It was unknown how many of the seven consensual interceptions involved recording as opposed to merely wiring the agent or informant with an electronic device used to transmit a signal when the agent or informant is in danger.

⁷⁸*State v. Glass*, 583 P.2d 872 (Alaska 1978); *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975) (both these cases involved convictions for the sale of heroin to wired informants). For an analysis of these cases, see Comment, *Warrant Requirement for Bugged Informants Under California Right to Privacy*, 15 Pac. L. J. 1057 (1984).

⁷⁹*On Lee*, 343 U.S. at 749; *United States v. McNulty*, 729 F.2d 1243, 1266 (10th Cir. 1983); *United States v. Keen*, 508 F.2d 986 (9th Cir. 1974).

⁸⁰*United States v. Kolodziej*, 706 F.2d 590, 593-94 (5th Cir. 1983) (Drug Enforcement Administration (DEA) agent's true statement to informant that she would be taken into custody and her child placed with welfare authorities if she did not cooperate and telephone her drug supplier did not render consent to electronic surveillance involuntary); *United States v. Salisbury*, 662 F.2d 738 (11th Cir. 1981) (mere hope of more lenient treatment not sufficient to render consent involuntary); *United States v. Brandon*, 633 F.2d 773, 776-77 (9th Cir. 1980) (DEA agent's promise to bring defendant's cooperation in drug investigation to attention of U.S. Attorney and to recommend leniency was not coercion); *People v. Velasquez*, 54 Cal. App. 3d 695, 126 Cal. Rptr. 656 (1976).

⁸¹*Cooper v. United States*, 594 F.2d 12, 14 (4th Cir. 1979); *United States v. Osser*, 483 F.2d 727, 730 (3d Cir. 1973); *United States v. Dowdy*, 479 F.2d 213 (4th Cir. 1973).

⁸²*United States v. Scaife*, 749 F.2d 338 (6th Cir. 1984); *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975); *United States v. Sell*, 487 A.2d 225 (D.C. App. 1985) (informant pending possible prostitution charge).

⁸³*United States v. Daranzo*, 699 F.2d 1097, 1100 (11th Cir. 1983); *United States v. Baynes*, 400 F. Supp. 285 (E.D. Pa. 1975).

be presented to show that the informant's free will was overborne through threats or improper inducements amounting to coercion and duress before the courts will suppress surveillance evidence.⁸⁴ Finally, the one-party consent exception to the warrant requirement has been held not to permit placing of bugs at the location where the conversation will occur.⁸⁵

There are many advantages to using wired agents or informants. First, unlike some other investigative methods, the wired informant can seek out his target and elicit the appropriate incriminating responses.⁸⁶ Second, the use of a transmitting device can protect the safety of the informant. Should the informant's true purpose be uncovered, the investigators who are receiving the transmission can quickly come to the informant's aid. Third, the informant's veracity is corroborated and cannot be impeached at trial. As Justice White commented in *White*: "with the recording in existence it is less likely that the informant will change his mind, less chance that a threat of injury will suppress unfavorable evidence, and less chance that cross-examination will confound the testimony."⁸⁷ In addition, the recording can be used to rebut an entrapment defense by showing the accused's intent and predisposition.⁸⁸

A fourth advantage is that by establishing the informant's veracity at trial the Criminal Investigation Division will be able to avoid the sometimes wasteful practice of trying to make repeated controlled buys from one seller. The Army's investigative policy on this matter states:

it is desirable to *make more than one purchase* from a peddler if possible. This procedure gives investigators more opportunity to locate the peddler's cache of drug and/or his source of supply. It also serves to identify other customers and helps establish that peddler is [sic] a regular participant in the illegal narcotics traffic and not a one-time or opportune offender. As the sources of

⁸⁴United States v. Silva, 449 F.2d 145, 146 (1st Cir. 1971), cert. denied, 405 U.S. 918 (1972).

⁸⁵United States v. Padilla, 520 F.2d 526 (1st Cir. 1975) (placing microphone in defendant's hotel room violated expectation of privacy even though taped conversation with DEA agent would have been admissible if the agent had been wired).

⁸⁶J. Carr, *supra* note 44, § 1.01[1][a][1], at 3.

⁸⁷*White*, 401 U.S. at 753.

⁸⁸United States v. Howell, 664 F.2d 101 (5th Cir. 1981) (error in admitting hearsay evidence to rebut entrapment defense was rendered harmless by tape recording showing the defendant's intent and predisposition).

supply and customers of a peddler are identified, the possibility of formulating a conspiracy involving other persons increases.⁸⁹

Although the Army's policy provides the right reasons for repeated buys and serves worthwhile investigative goals, many times the real and less desirable reason for repeated buys is the need to establish a dirty informant's veracity at trial and to avoid the entrapment defense. This less desirable reason must be weighed against the major drawback of repeated buys—they can take time, during which the commander is stuck with someone in the unit who he or she knows is selling drugs to other members of the unit. In addition, repeated buys result in taxpayer's money being used to support the drug trade.

The use of a wired informant to make a controlled buy will ensure that any repeated buys will be made in furtherance of good investigative policy. From listening to the actual conversations, the experienced drug investigator can determine if any entrapment defense may be available. The investigator can also determine the potential size and scope of any drug conspiracy, as well as the likelihood that the informant would be able to penetrate the drug ring through further buys. Once the investigator determines that repeated buys would be fruitless, then the options of making an immediate apprehension or pursuing nonconsensual surveillance through a wiretap or "bug" can be wisely explored. The use of wired informants has many times provided probable cause for nonconsensual surveillance, which often will be the only alternative available that will uncover the full extent of a drug distribution network.⁹⁰

A fifth advantage, which will be discussed later, is that the wired informant may not have to be produced at trial. This advantage allows government agents to protect the informant's whereabouts and safety.

With these many advantages, one would suspect that consensual electronic surveillance would be commonplace in Army drug investigations. However, common use is prevented by many undue administrative burdens and other practical problems, such

⁸⁹Dep't of Army, Field Manual No. 19-20, Law Enforcement Investigations 409 (29 Apr. 1977).

⁹⁰State v. Iverson, 364 N.W.2d 518 (S.D. 1985); State v. Walker, 107 Idaho 308, 688 P.2d 1213 (Idaho Ct. App. 1984); People v. Levine, 152 Cal. App. 3d 1058, 199 Cal. Rptr. 756 (1984).

as locating the proper equipment.⁹¹ One such burden is the Army's general policy requirement that the

[i]nterception of wire and oral communications is a special technique which shall not be considered as a substitute for normal investigative procedures and shall be authorized only in those circumstances where it is demonstrated that the information is necessary for a criminal investigation and cannot reasonably be obtained in some other, less intrusive manner.⁹²

Although this requirement is appropriate for nonconsensual surveillance, it should have no applicability to consensual surveillance, which the Court of Military Appeals held in *Samora* does not implicate the fourth amendment. Therefore, this section of the regulation should be clarified so as not to be an unnecessary obstruction to consensual electronic surveillance.

Another and more significant undue burden is the requirement to obtain the Army General Counsel's approval prior to conducting consensual electronic surveillance.⁹³ This requirement is particularly onerous in overseas commands. In contrast, a federal Drug Enforcement Administration (DEA) or Federal Bureau of Investigation (FBI) agent may, in the ordinary drug case, obtain permission to conduct consensual surveillance from any local Assistant U.S. Attorney (AUSA). Pertinent Department of Justice (DOJ) policy provides:

Trial Attorney Approval. The request must state that the facts of the surveillance have been discussed with the United States Attorney, an Assistant United States Attorney, an Organized Crime Strike Force Attorney for the district in which the surveillance will occur, or any previously designated Department of Justice attorney for a particular investigation, and that such attorney has

⁹¹Andrews, *Consensual Interceptions*, 11 The Detective 30 (Spring-Summer 1984) (published quarterly by the U.S. Army Criminal Investigation Command).

⁹²Dep't of Army, Reg. No. 190-53, *Interception of Wire and Oral Communications for Law Enforcement Purposes*, para. 1-4c (3 Nov. 1986) [hereinafter AR 190-53].

⁹³AR 190-53, paragraph 1-6c authorizes "the Secretary of the Army, Under Secretary of the Army, or the Army General Counsel . . . [to] approve or deny requests to conduct consensual interceptions . . . This approval authority shall not be further delegated." The rationale for this policy appears to be the desire to maintain high-level civilian political control over all forms of electronic surveillance.

stated that the surveillance is appropriate under this order. Such statement may be made orally.⁹⁴

This same policy, however, requires all other executive agencies, such as the Army, to obtain high-level headquarters approval.⁹⁵

This policy was not intended to have extraterritorial application.⁹⁶ Therefore, the Army, in coordination with the Department of Defense (DOD), should seek, at a minimum, to amend these policies to allow the Commander, **U.S.** Army Criminal Investigation Command (USACIDC) (a high-level headquarters official), to approve consensual intercepts in the United States; and the regional commanders of CID to approve consensual surveillance in their respective overseas areas. This delegation in overseas areas could be controlled through strict issuing guidelines, as well as the present reporting requirements. This change would result in more effective use of consensual surveillance.

Furthermore, this change would be more in tune with the courts' view that consensual surveillance does not implicate fourth amendment rights. In *United States v. Caceres*,⁹⁷ Caceres was charged with the bribery of an IRS Agent, Yee, who was conducting an audit of Caceres' tax return. Unbeknown to Caceres, Yee wore a concealed radio transmitter that allowed other agents to monitor and record Caceres' bribery. The interception of the conversation, however, occurred prior to the Assistant Attorney General's approval, and was, as a result, in violation of the IRS Manual. The Court held that suppression of the recorded bribery was not appropriate, because neither the Constitution nor an Act of Congress required official approval before conversations could be overheard and recorded with the consent of one of the parties.⁹⁸

With these advantages and changes, consensual electronic surveillance should become more prevalent and effective in the future. More serious questions and problems exist before nonconsensual electronic surveillance becomes an effective law enforcement tool in the Army.

*Department of Justice Memorandum from William French Smith, U.S. Attorney General, to the Heads and Inspectors General of Executive Departments and Agencies, at 5 (Nov. 7, 1983).

⁹⁴*Id.* at 7.

⁹⁵*Id.* at 4.

⁹⁶440 U.S. 741 (1979).

⁹⁷*Id.* at 744.

C. NONCONSENSUAL SURVEILLANCE

The Army has not made full use of nonconsensual electronic surveillance in drug cases,⁹⁹ whereas these techniques are extensively employed by state and federal investigators.¹⁰⁰ The main obstacle to nonconsensual surveillance is the need for high-level Justice Department approval and a court order. Once DOJ approval is obtained, court approval is almost a certainty.¹⁰¹ Title III restricts DOJ approval to the "Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General."¹⁰²

The legislative history behind this restriction shows that Congress intended to limit authorization of nonconsensual interceptions to publicly identifiable and responsible officials subject to the political process.¹⁰³ The Attorney General and the nine Assistant Attorneys General are political appointees who must be confirmed with the advice and consent of the Senate.¹⁰⁴ The Supreme Court has held that this authority may not be further delegated and failure to obtain proper approval will result in suppression of the evidence.¹⁰⁵ This restriction is in sharp contrast to the provision of Title III that **allows** the principal prosecuting

⁹⁹In the year ending October 1985, the Army had not conducted any nonconsensual intercepts in drug investigations. Interview with M. Wesley Clark, Attorney Advisor, Office of the Staff Judge Advocate, U.S. Army Criminal Investigation Command, Falls Church, Va. (Jan. 8, 1986).

¹⁰⁰Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire and Oral Communications 2-4 (1986) [hereinafter Administrative Office's Report on Applications for Orders] reported that a total of 784 nonconsensual intercepts were authorized by federal and state courts. Of these, 83.1% were wiretaps and 55.4% of the orders involved narcotics as the most serious offense identified.

¹⁰¹See Department of Justice, Annual Report of the Attorney General of the United States 77 (1985), which states: "During 1984, some 462 original and extension wiretap authorizations were processed to approval. . . All requests were processed quickly, and no authorizations were rejected by the court."

¹⁰²18 U.S.C. § 2516(1) (1982), *as amended by* Electronic Communications Privacy Act of 1986, Pub. L. 99-508, § 104, 100 Stat. 1848, 1855 (1986). Before the 1986 amendments, only the Attorney General and specially designated Assistant Attorneys General could grant authorization.

"United States v. Giordano, 416 U.S. 505 (1974). "[T]he mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *Id.* at 515-16.

¹⁰⁴28 U.S.C. §§ 503, 506 (1982).

¹⁰⁵*Giordano*, 416 U.S. at 513. For a full discussion of the case law interpreting this provision, see Annotation, *Who May Apply or Authorize Application for Order to Intercept Wire or Oral Communications Under Title III of Omnibus Crime Control and Safe Streets Act of 1968*, 64 A.L.R. Fed. 115 (1983).

attorney of a state or "any political subdivision thereof" to authorize these interceptions.¹⁰⁶

The limited number of approval authorities, however, should not be viewed by Army drug investigators as an insurmountable burden. Nor do the other requirements of Title 111, which will now be discussed, make nonconsensual surveillance impractical. The courts are sympathetic and understand the problems confronting the drug investigator who is trying to penetrate the otherwise impenetrable drug ring.

1. *Probable Cause.*

To obtain a court order to conduct nonconsensual electronic surveillance, the Government must establish probable cause. Section 2518(3) requires the judge to determine:

(a) there is probable cause for belief that ~~an~~ individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 . . . ;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(d) . . . , there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.¹⁰⁷

The probable cause determination is the same and requires the same quantum of evidence needed for traditional searches and seizures.¹⁰⁸ Moreover, unlike the other statutory requirements that will be discussed later, the probable cause requirement is in no way lessened in drug investigations. As Justice Byron White wrote recently in *United States v. Karo*,¹⁰⁹ "[t]hose suspected of

¹⁰⁶18 U.S.C. § 2516(2) (1982). Some courts have held this authority may be further delegated. See Annotation, *supra* note 105, § 7[b].

¹⁰⁷18 U.S.C. § 2518(3) (1982). The Government may obtain a waiver from the subsection (d) requirement if it is not practical to specify the facilities or the place where the interception will take place. See Electronic Communications Privacy Act of 1986, Pub. L. 99-508, § 106(d)(3), 100 Stat. 1848 (1986) (to be codified at 18 U.S.C. § 2518(11)).

¹⁰⁸*United States v. Marcello*, 531 F. Supp. 1113 (C.D. Cal. 1982), *aff'd*, 731 F.2d 1354 (9th Cir. 1984); *United States v. Harvey*, 560 F. Supp. 1040 (S.D. Fla. 1982); *United States v. Fina*, 405 F. Supp. 267 (E.D. Pa. 1975); *United States v. Baynes*, 400 F. Supp. 285 (E.D. Pa. 1975); *United States v. DeCesaro*, 349 F. Supp. 546 (E.D. Wis. 1972).

¹⁰⁹468 U.S. 705 (1984) (held that warrant was required prior to affixing "beeper"

drug offenses are no less entitled to that protection [fourth amendment] than those suspected of non-drug offenses."¹¹⁰ Probable cause, however, need only exist as to one participant in the conversation in order to conduct the interception.¹¹¹

Certain factors peculiar to the nature of drug conspiracies do enter into the probable cause equation. One such factor is the ongoing nature of drug conspiracies. In *United States v. Domme*,¹¹² the court affirmed the defendant's conviction for conspiracy to distribute cocaine, even though the government had obtained a wiretap order by submitting an affidavit describing criminal activity that was then almost six months old.¹¹³ The court determined that this information was not stale:

The length of time between the date on which **all** of the facts supporting probable cause were known and the date the warrant was issued is only one factor. Probable cause is not determined merely by counting the number of days between the facts relied upon and the warrant's issuance. Rather, the probable cause standard is a practical, nontechnical one. When the criminal activity is protracted and continuous, it is more likely that the passage of time will not dissipate probable cause. In such circumstances, it is reasonable to assume that the activity has continued beyond the last dates mentioned in the affidavits, and may still be continuing. Time becomes less significant in the wiretap context, because the evidence sought to be seized is not a tangible object easily destroyed or removed. Therefore, . . . the stale information issue should be construed less rigorously.¹¹⁴

Probable cause for the wiretap order in this case was also based upon a pen register recording of phone numbers dialed and toll

tracking device on can of ether (used distill cocaine from fabric) that was to be taken into a private residence).

¹¹⁰468 U.S. at 717.

¹¹¹*United States v. Figueroa*, 757 F.2d 466, 473 (2d Cir. 1985); *United States v. Doolittle*, 507 F.2d 1368, 1371 (5th Cir.), *aff'd en banc*, 518 F.2d 500 (5th Cir. 1975), *cert. denied*, 430 U.S. 905 (1977); *United States v. Tortorello*, 480 F.2d 764, 775 (2d Cir. 1973); *United States v. Chiarizio*, 388 F. Supp. 858 (D. Conn.), *aff'd*, 525 F.2d 289 (2d Cir. 1975).

¹¹²753 F.2d 950 (11th Cir. 1985).

¹¹³*Id.* at 953-55.

¹¹⁴*Id.* at 953. Another case that has held the lapse of time is less significant in determining probable cause for nonconsensual surveillance of **drug** conspirators is *United States v. Webster*, 639 F.2d 174 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981).

records showing long distance calls placed.¹¹⁵ These records also established that the defendant had changed his phone number five times in the last twenty-eight months. A law enforcement official was able to testify that, based on his extensive investigative experience, it was a common practice for drug dealers to change phone numbers.¹¹⁶

Thus the expert testimony of drug investigators is another factor that can be critical in establishing probable cause for nonconsensual surveillance. Expert testimony from drug investigators is also useful in deciphering otherwise meaningless drug conversations. The courts have consistently recognized that cryptic and ambiguous conversations between drug conspirators may establish probable cause for an eavesdropping warrant when they are interpreted by an experienced investigator.¹¹⁷

2. *Inadequacy of Traditional Investigative Techniques.*

Section 2518(1)(c) of Title III requires an applicant for a court order to provide ****full** and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too **dangerous.**"¹¹⁸ The Supreme Court, in *United States v.*

¹¹⁵*Domme*, 753 F.2d at 953.

¹¹⁶*Id.*

¹¹⁷*United States v. Armocida*, 515 F.2d 29, 39 n.12 (3d Cir. 1975) ("shoe salesman" was a term used for drug supplier); *United States v. Errera*, 616 F. Supp. 1145 (D. Md. 1985) (interpretation of drug code language sufficient for probable cause as long as interpretation was reasonable); *United States v. Ramirez*, 602 F. Supp. 783, 789 (S.D.N.Y. 1985) (conversation concerning the "price of rocks" was sufficient to indicate narcotics violations); *United States v. Sierra*, 585 F. Supp. 1236, 1239 (D.N.J. 1984) (defendant's use of code words provided probable cause for drug violation even though agents could not be certain of the identity of the illicit drug); *People v. Manuli*, 104 A.D. 2d 386, 388, 478 N.Y.S.2d 712, 714 (1984) (investigator testified in support of wiretap order that "eightball" referred to an eighth of an ounce of cocaine); *Commonwealth v. Macolino*, 336 Pa. Super. 386, 393-94, 485 A.2d 1134, 1138 (1984) (in issuing warrant, magistrate could rely on experienced state trooper's synopsis of meaning of coded drug conversations without having to examine the transcripts of recorded conversations).

¹¹⁸18 U.S.C. § 2518(1)(c) (1982). AR 190-53 makes repeated references to the exhaustion of alternative investigative techniques. The first reference, paragraph 1-4c, is in the general policy section of the regulation and presumably would be applicable to both consensual and nonconsensual electronic surveillance. As noted earlier, it provides that electronic surveillance is not a "substitute for normal investigative procedures" and may only be used when "necessary for a criminal investigation" and the evidence "cannot reasonably be obtained in some other, less intrusive manner." In the Request for Authorization for nonconsensual surveillance, paragraph 2-1a(3), AR 190-53 parallels section 2518(1)(c) and requires the CID agent to include "[a] statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Paragraph 2-2a(4)(b) repeats this requirement for nonconsensual interception conducted abroad.

Kahn,¹¹⁹ stated that this necessity requirement exists "to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the **crime**."¹²⁰ The Court further held, in *United States v. Giordana*,¹²¹ that the necessity requirement is not intended to relegate the use of wiretaps to that of last **resort**,¹²² and that the restriction on use must **be** interpreted "in a practical **and** common sense **fashion**."¹²³ For this reason, courts have held that traditional surveillance techniques do not have to be exhausted if they would be futile, impractical, dangerous, or inconvenient.¹²⁴

In the investigation of drug conspiracies, nonconsensual electronic surveillance is often necessary to serve two legitimate law enforcement purposes: (1) to uncover and penetrate the otherwise secretive and victimless nature of drug conspiracies, and (2) to determine the **full** extent of the conspiracy and the location of **all** the contraband. Moreover, the courts have been increasingly **willing** to find almost as a blanket rule that traditional and less intrusive investigatory techniques are inadequate to meet those two legitimate purposes in drug investigations.¹²⁵

As previously noted, drug offenses are by nature secretive and victimless. The typical drug deal is not consummated in public. Furthermore, a drug dealer is not going to make a sale to a

¹¹⁹415 U.S. 143 (1974).

¹²⁰*Id.* at 153 n.12. The fourth amendment requirement that searches and seizures be reasonable would require that less intrusive invasions of privacy be used where they would yield the same evidence. Therefore, section 2518(1)(c) has clear constitutional underpinnings. For a fuller discussion of this aspect, see Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. Crim. L. & Criminology 1, 126 (1983).

¹²¹416 U.S. 505 (1974).

¹²²*Id.* at 515.

¹²³S. Rep. No. 1097, 90th Cong., 2d Sess. 101, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2190; *see also* *United States v. Hyde*, 574 F.2d 856 (5th Cir. 1978); *United States v. Van Horn*, 579 F. Supp. 804, 810 (D. Neb. 1984); *Gonzalez v. State*, 175 Ga. App. 217, 333 S.E.2d 132 (1985).

¹²⁴*United States v. Brown*, 761 F.2d 1272, 1276 (9th Cir. 1985) (infiltration by FBI agents extremely dangerous due to threats received in drug investigation); *United States v. Lilla*, 699 F.2d 99, 102 (2d Cir. 1983); *United States v. Grabow*, 621 F. Supp. 787 (D. Colo. 1985) (other investigative techniques are generally inadequate when investigating spokes and hub type drug conspiracy); *United States v. Tufaro*, 593 F. Supp. 476, 488 (S.D.N.Y. 1983); *State v. Olea*, 139 Arb. 280, 678 P.2d 465, 474 (Ariz. Ct. App. 1983).

¹²⁵*United States v. Newman*, 733 F.2d 1395, 1399 (10th Cir. 1984); *United States v. James*, 494 F.2d 1007, 1016 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); *Tufaro*, 593 F. Supp. at 488; *United States v. Falcone*, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd mem.*, 500 F.2d 1399 (3d Cir. 1974); *United States v. King*, 335 F. Supp. 523, 535 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973); *United States v. Escander*, 319 F. Supp. 295, 303 (S.D. Fla. 1970); *State v. Bilbo*, 240 Ga. 601, 242 S.E.2d 21 (1978); *Gonzalez*, 333 S.E.2d at 137.

uniformed military policeman or to the post chaplain. Unlike a barracks larceny or an assault, no complaining victim normally exists. For this reason, law enforcement authorities must try to penetrate drug rings through the use of confidential informants. Generally, the investigative agents try to get an informant to introduce an undercover agent to the drug dealer.¹²⁶ In this manner, the undercover agent can make the buy and the Government does not have to present the testimony of the informant, who many times is an easily impeached witness. Moreover, this procedure allows the Government to protect the informant's identity and thereby obtain further information from the informant as well as protect the informant from the fear of reprisals.

Unfortunately, this technique has proven to be inadequate because the drug dealer simply refuses to deal with strangers.¹²⁷ The next step for law enforcement agents is to attempt to set up a "controlled buy" made by the confidential informant.¹²⁸ With this technique, however, the confidential informant now must testify and the government must disclose his or her identity. This could result in the possibility of physical harm to the informant. As a result, the informant may be unwilling to make the buy.¹²⁹ Even if he does successfully complete the buy and is willing to testify in court, his veracity at trial will be subject to impeachment. Informants in the Army usually have a motive to lie for one of two reasons.¹³⁰ First, many times they have been arrested for their own drug offenses and may even be facing charges. Thus

¹²⁶See Dep't of Army, Criminal Investigation Div. Reg. No. 195-8, Criminal Investigation Drug Suppression Program, para. 2-14 (1 May 1983)[hereinafter CID Reg. 195-8].

¹²⁷United States v. Martino, 664 F.2d 860 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110 (1982) (suspected drug dealer would have nothing to do with undercover agent); *Olea*, 139 Ark. at 289, 678 P.2d at 474; Haina v. State, 30 Md. App. 295, 352 A.2d 874 (1976).

¹²⁸This method usually involves a strip search of the informant and close physical surveillance. See CID Reg. 195-8, para. 2-14(b).

¹²⁹United States v. Vento, 533 F.2d 838, 849 (3d Cir. 1976); United States v. Castellano, 610 F. Supp. 1359, 1429 (S.D.N.Y. 1985); United States v. Rodriguez, 606 F. Supp. 1363, 1367 (D. Mass. 1985) (confidential informant refused to cooperate, even when offered protection and relocation under the Witness Protection Program); United States v. Van Horn, 579 F. Supp. 804, 814 (D. Neb. 1984); United States v. Shipp, 578 F. Supp. 980, 988 (S.D.N.Y. 1984); *Olea*, 139 Ark. at 289, 678 P.2d at 474.

¹³⁰See generally United States v. Woods, 544 F.2d 242, 257 (6th Cir. 1976) (dictum), *cert. denied*, 429 U.S. 1062 (1977); United States v. Leta, 332 F. Supp. 1357, 1363 (M.D. Pa. 1971); United States v. Falcone, 364 F. Supp. 877, 890-92 (D.N.J. 1973), *aff'd mem.*, 500 F.2d 1399 (3d Cir. 1974); United States v. Whitaker, 343 F. Supp. 358, 363 (E.D. Pa. 1972), *rev'd on other grounds*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 950 (1973).

their cooperation will be in return for some form of leniency from the Government. Second, informants may be motivated by the desire to stop the illicit drug trade or by an ambition to become a law enforcement official, or both. Either way, their testimony will be impeachable at trial. Consequently, the courts have continually found that the fact that the Government has been able to make successfully a "controlled buy" through the use of an informant is not sufficient grounds to determine that nonconsensual electronic surveillance is unnecessary.¹³¹ Frequently, the problem of the informant's veracity cannot be remedied through the use of a "bug" placed on the informant's person. For example, in *Gonzalez v. State*,¹³² the affidavit in support of a wiretap application stated that it was impossible to use **an** informant with a bug, because another informant, who had been previously used to make a controlled drug buy, had been searched by the conspirators before they even talked to him.¹³³ Additionally, a wired informant or a wired undercover agent should not be used if it would place the informant or agent in physical danger.¹³⁴ Furthermore, **a** controlled buy may be impossible due to the lack of sufficient government funds. This occurred in *United States v. Rodriguez*,¹³⁵ where the undercover DEA agent had to refuse to make repeated buys of ten to twenty kilograms of cocaine.

Even assuming a wired informant or agent successfully makes a controlled buy, this success does not prevent the Government from demonstrating the necessity for nonconsensual electronic surveillance.¹³⁶ The wired informant or agent may only be able to make contact with the lower echelons of an organized drug distribution **network**.¹³⁷ As a result, he or she cannot discover the number of participants in the conspiracy or the location where **all** the drugs are stored.¹³⁸ The courts have consistently permitted

¹³¹United States v. Armocida, 515 F.2d 29, 38 (3d Cir. 1975); United States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975); United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975); United States v. Rodriguez, 612 F. Supp. 718, 721 (D. Conn. 1985); *Van Horn*, 579 F. Supp. at 814; *Olea*, 139 Ariz. at 283, 288-89, 678 P.2d at 468, 473-74.

¹³²175 Ga. App. 217, 333 S.E.2d 132 (1985).

¹³³*Id.* at 137.

¹³⁴United States v. Vento, 533 F.2d 838, 849-50 (3d Cir. 1976); United States v. Shipp, 578 F. Supp. 980, 988 (S.D.N.Y. 1984); *Lewis v. State*, 100 Nev. 456, 686 P.2d 219 (1984); *Olea*, 139 Ariz. at 289, 678 P.2d at 474; *Zuppari v. State*, 367 So.2d 601, 605 (Fla. 1978).

¹³⁵612 F. Supp. 718 (D.Conn. 1978).

¹³⁶United States v. Tufaro, 593 F. Supp. 476, 489 (S.D.N.Y. 1983).

¹³⁷*Id.*; *Olea*, 139 Ariz. at 289, 678 P.2d at 474.

¹³⁸United States v. Martino, 664 F.2d 860, 868 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110 (1982); United States v. Rodriguez, 612 F. Supp. 718, 722 (D.Conn. 1985); United States v. Rodriguez, 606 F. Supp. 1363, 1367 (D. Mass. 1985);

the use of nonconsensual surveillance as a means to "climb up the ladder" to reach the well-insulated major suppliers and **organizers**.¹³⁹ Nothing in the law requires an arrest to be made as soon as probable cause is obtained.¹⁴⁰

Likewise, government agents do not have to obtain a traditional search warrant once they come upon probable cause that illicit **drugs** can be found in a particular location.¹⁴¹ Either traditional method—an arrest followed by interrogations or a search of a particular place—will compromise further investigation into the full extent of the drug **conspiracy**.¹⁴² A traditional search is also unlikely to recover an organizational chart of the drug conspirators, who very rarely keep detailed records of their participants or **transactions**.¹⁴³ For these reasons, the courts permit government agents to forego the traditional search in favor of nonconsensual electronic surveillance.¹⁴⁴

The courts have also generally found other investigative methods to be inadequate in investigations into large-scale drug operations. Physical surveillance often fails because of the drug **dealers'** heightened concern for secrecy and caution.¹⁴⁵ Physical surveillance is also risky, because, if detected, the investigation will be compromised.¹⁴⁶ The use of pen registers, telephone tracing, and toll records, all of which are less intrusive and do not require

Tufaro, 593 F. Supp. at 489; *United States v. Van Horn*, 579 F. Supp. 804, 804 (D. Neb. 1984).

¹³⁹*United States v. Williams*, 580 F.2d 578, 590 n.73 (D.C. Cir. 1978); *United States v. Sandoval*, 550 F.2d 427, 430 (9th Cir. 1976), *cert. denied*, 434 U.S. 87 (1977); *United States v. DePalma*, 461 F. Supp. 800, 811 (S.D.N.Y. 1978); *Olea*, 139 Ariz. at 289, 678 P.2d at 474.

¹⁴⁰*United States v. Lambert*, 771 F.2d 83, 91 (6th Cir. 1985) (alternative investigative procedure of the arrest of the accused and his associates would likely compromise the investigation by alerting other subjects to the presence and scope of the investigation); *United States v. Castellano*, 610 F. Supp. 1359, 1430 (S.D.N.Y. 1985); *Van Horn*, 579 F. Supp. at 814.

¹⁴¹*Lambert*, 771 F.2d at 91; *Van Horn*, 579 F. Supp. at 814; *Olea*, 139 Ariz. at 289, 678 P.2d at 474.

¹⁴²*Rodriguez*, 612 F. Supp. at 722 (traditional search may not have found drugs and would have compromised investigation); *Olea*, 139 Ariz. at 289, 678 P.2d at 474.

¹⁴³*Olea*, 139 Ariz. at 289, 678 P.2d at 474.

¹⁴⁴*Rodriguez*, 612 F. Supp. at 722; *United States v. Rodriguez*, 606 F. Supp. 1363, 1369 (D. Mass. 1985); *Olea*, 139 Ariz. at 289, 678 P.2d at 474.

¹⁴⁵*United States v. Brown*, 761 F.2d 1272, 1276 (9th Cir. 1985); *United States v. Losing*, 560 F.2d 906 (8th Cir.), *cert. denied*, 434 U.S. 969 (1977); *Vento*, 533 F.2d at 849; *Rodriguez*, 612 F. Supp. at 722; *Olea*, 139 Ariz. at 289, 678 P.2d at 474.

¹⁴⁶*United States v. Lambert*, 771 F.2d 83, 91 (6th Cir. 1985); *United States v. Martino*, 664 F.2d 860, 868 (2d Cir. 1981) (defendant drove evasively when investigators made attempts to follow him), *cert. denied*, 458 U.S. 1110 (1982); *United States v. Castellano*, 610 F. Supp. 1359, 1430 (S.D.N.Y. 1985); *United States v. Van Horn*, 579 F. Supp. 804, 814 (D. Neb. 1984); *Olea*, 139 Ariz. at 289, 678 P.2d at 474.

a search **warrant**,¹⁴⁷ have similarly been found to be inadequate.¹⁴⁸ Although these methods can uncover a high volume of telephone calls, as well as provide the numbers dialed, they do not reveal the content of conversations, which provide the real incriminating evidence.

Accordingly, drug investigators do not have an insurmountable burden in showing that traditional investigatory techniques are inadequate. Although a "boilerplate," general allegation of a drug conspiracy is **insufficient**,¹⁴⁹ the courts will normally defer to the **drug** agent's expertise as to why certain investigatory methods were either too costly, dangerous, inconvenient, or fruitless.¹⁵⁰ All methods need not be actually tried and it is sufficient if the agent has merely given them serious consideration.¹⁵¹

3. Particularity.

The fourth amendment requires that search warrants "particularly describ[e] the place to be searched and the persons or things to be **seized**."¹⁵² This requirement is incorporated in Section 2518(1)(b) of Title III which provides that, when applying for a court order to conduct nonconsensual surveillance, the law enforcement official must submit a statement that includes:

(i) details as to the particular offense that has been, is being, or is about to be committed, (ii) . . . a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if **known**, committing the offense and whose communications are to be intercepted;¹⁵³

The court order must also meet the same particularity requirement ~ . ~ ~ ~

"Smith v. Maryland, 442 U.S. 735 (1983); United States v. Newman, 733 F.2d 1395 (10th Cir. 1984). But see People v. Carr, 682 P.2d 20 (Colo. 1984) (warrant needed to obtain toll records from telephone company); AR 190-53, para. 3-2.

¹⁴⁸Brown, 761 F.2d at 1276 (telephone toll records showed high volume of calls but not much else); Rodriguez, 612 F. Supp. at 721; Castellano, 610 F. Supp. at 1430; Van Horn, 579 F. Supp. at 814; Olea, 139 Ariz. at 289, 678 P.2d at 474.

¹⁴⁹United States v. Kalustian, 529 F.2d 585, 589 (9th Cir. 1979); United States v. Webster, 473 F. Supp. 586 (D. Md. 1979); Olea, 139 Ariz. at 289, 678 P.2d at 474.

¹⁵⁰See supra note 124.

¹⁵¹United States v. Lambert, 771 F.2d 83, 91 (6th Cir. 1985).

¹⁵²U.S. Const. amend IV.

¹⁵³18 U.S.C. § 2518(1)(b)(1982). The same requirement is incorporated into AR 190-53, paras. 2-1a(2) and 2-2a(5)(a). As with subsection (3)(d), the statute now allows the government to obtain an exemption from the subsection (1)(b)(ii) requirements if it is impractical to specify the facility or place where the interception will take place see supra note 107.

"Section 2518(4) provides:

Meeting the particularity requirement as to where the wiretap or "bug" is to be located should present few problems to the drug investigator. Title III does not require that the phone number to be wiretapped be specifically listed, as long as there is probable cause to tap the telephone located at a specified address.¹⁵⁵ Moreover, a clerical error in the address listed will not result in suppression of wiretap evidence where the phone number is correctly stated.¹⁵⁶ Conversely, a clerical error in the phone number listed in the authorization has been held to be immaterial where the address and location of the phones were accurate.¹⁵⁷ In situations where a "bug" is to be installed, the application for a court order need only name the address or location of the premises.¹⁵⁸ The courts will defer to the experienced judgment and discretion of the investigator as to the best place to locate the "bug" within an office or house.¹⁵⁹

Each order authorizing or approving the interception of any wire, oral, or electronic communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted:

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted,

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;. . .

18 U.S.C. § 2518(1)(b) (1982), *as amended by* Electronic Communications Privacy Act of 1986, Pub. L. 99-508, § 101(c)(1)(A), 100 Stat. 1848 (1986).

¹⁵⁵United States v. Feldman, 606 F.2d 673, 679-81 (6th Cir. 1979); United States v. Bynum, 386 F. Supp. 449 (S.D.N.Y. 1974).

¹⁵⁶State v. Buffa, 347 So.2d 688 (Fla. Dist. Ct. App. 1977); State v. Willis, 7 Kan. App. 413, 418, 643 P.2d 1112, 1115 (1982).

¹⁵⁷United States v. Doolittle, 507 F.2d 1368 (11th Cir.), *aff'd en banc*, 518 F.2d 500 (11th Cir. 1975).

¹⁵⁸United States v. Lambert, 771 F.2d 83, 91 (6th Cir. 1985) (agent permitted to locate "bug" in bedroom where order identified only the specific house).

¹⁵⁹One court explained the rationale for permitting the agent to locate the bug:

[J]udges [should not] be presumed to have such familiarity with the . . . premises in which [listening devices] are to be installed that a court should be required in its order to specify . . . the appropriate location of the bug . . . Were this to be required, a judge, in consultation with law enforcement officers might have to visit the premises to be entered and discuss . . . the areas for installation. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field.

United States v. Scafidi, 564 F.2d 633, 640 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978), *cited in Lambert*, 771 F.2d at 91 n.4.

Once the agent has obtained the court order for nonconsensual surveillance, no further authorization is necessary for any covert entry into private premises to install the wiretap or bug. In *United States v. Dalia*,¹⁶⁰ the defendant was suspected of conspiring to transport, receive, and possess a \$250,000 shipment of stolen fabrics.¹⁶¹ FBI agents obtained a court order authorizing the interception of all pertinent oral communications in Dalia's business office. Nothing in the order stated how this interception was to be accomplished.¹⁶² The FBI agents secretly entered Dalia's office at midnight and spent three hours installing the electronic bug in the **ceiling**.¹⁶³ The Court upheld the constitutionality of the entry, but stated that the means of accomplishing electronic surveillance must still be reasonable under all the circumstances.¹⁶⁴ Consequently, government agents would not be free to look around or search the premises as part of the installation of a bug.¹⁶⁵ Nevertheless, this decision places considerable authority and discretion in the hands of government investigators.

The particularity requirement of section 2518(1)(b)(iii) regarding the "types of communication ... to be intercepted" is usually defined in terms of section 2518(1)(b)(i), which requires particularity as to the offense. In dealing with **drug** offenses and conspiracies, the courts have allowed a broad interpretation of the types of conversations. In *State v. Weedon*,¹⁶⁶ the wiretap order authorized interception of "'conservations pertaining to violations of the laws of this State relating to dealings in dangerous drugs.'" ¹⁶⁷ The court stated that this order satisfied the particularity requirement even though it failed to specify that the subject of the conversations would be marijuana.¹⁶⁸ Similarly, in *United States v. Cohen*,¹⁶⁹ the Fifth Circuit upheld a wiretap order that authorized the interception of "any and all conversations having discussions related to or concerning sale, possession, smuggling, or unauthorized trafficking in narcotics and dangerous

¹⁶⁰441 U.S. 238 (1979).

¹⁶¹*Id.* at 244.

¹⁶²*Id.* at 242.

¹⁶³*Id.* at 245.

¹⁶⁴*Id.* at 258.

¹⁶⁵*Id.*

¹⁶⁶425 So.2d 125, 126 (Fla. Dist. Ct. App. 1982).

¹⁶⁷*Id.* (quoting the wiretap order).

¹⁶⁸*Id.*; see also *United States v. Ardito*, 782 F.2d 358 (2d Cir. 1986) (inferred scope of order to include obstruction of justice offense based on the information provided to the official authorizing the wiretap).

¹⁶⁹530 F.2d 43 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976).

drugs, in violation of Chapter 893, Florida Statutes.”¹⁷⁰ The rationale for permitting a broad description of the conversations to be intercepted in drug investigations was aptly addressed by the Second Circuit:

When, as here, a continuing course of criminal conduct is involved, a wiretap order must necessarily be framed flexibly enough to permit interception of any statements concerning a specified pattern of crime Though the instant order was couched in general terms, the interceptions authorized thereby were clearly limited in purpose and duration to the narcotics offenses described. This was sufficient to satisfy the Fourth Amendment in the context of an ongoing drug operation.¹⁷¹

The courts, therefore, do not require the applicant to predict the actual content of intercepted **conversations**.¹⁷² As a result, Army investigators should have no problem in meeting this particularity requirement in drug cases.

A more difficult question in drug investigations is providing the names of the targets of the interception. Usually, investigators will not know **all** the participants in a drug ring. Indeed, one of the main purposes of nonconsensual surveillance in drug investigations is to determine who they are and the extent of the conspiracy. Appropriately, section 2518 permits the targeting of persons who are “**unknown**”.¹⁷³ The Supreme Court has interpreted this requirement to mean that only those persons who the investigators have probable cause to believe are involved in perpetrating the offense must be named. In *United States v. Kahn*,¹⁷⁴ the defendant was a suspected bookmaker in a gambling business. After tapping his home telephone, the investigators overheard Kahn’s wife make incriminating telephone calls to known gambling figures.¹⁷⁵ Although Mrs. Kahn had not been named in the order, it did provide for the interception of the

¹⁷⁰*Id.* at 45-46; *see also* *United States v. Castellano*, 610 F. Supp. 1359, 1433 (S.D.N.Y. 1985). *But see* *United States v. Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971) (language similar to that found in *Cohen* was too overbroad to meet the particularity requirement).

¹⁷¹*United States v. Steinberg*, 525 F.2d 1126, 1131-32 (2d Cir. 1975); *see also* *United States v. Principie*, 531 F.2d 1132 (2d Cir. 1976).

¹⁷²*United States v. Licavoli*, 604 F.2d 613, 620 (9th Cir. 1979); *United States v. Tortorello*, 480 F.2d 764, 780 (2d Cir. 1973); *United States v. Sklaroff*, 323 F. Supp. 296, 307 (S.D. Fla. 1971).

¹⁷³18 U.S.C. §§ 2518(1)(b), (3)(a), (4)(a) (1982).

¹⁷⁴415 U.S. 143 (1974).

¹⁷⁵*Id.* at 147.

accused and “others as yet **unknown**.”¹⁷⁶ The Court held that Mrs. **Kahn** was covered as a person who was “as yet unknown” and allowed the admissibility of her phone **conversations**.¹⁷⁷ The Court further held that, once the inadequacy of other investigative techniques has been shown pursuant to Sections 2518(1)(c) and 2518(3)(c), the requirement to provide the names of persons subject to interceptions requires no additional investigation.¹⁷⁸ This lack of any requirement for additional investigation to discover the identities of other persons subject to interception is especially significant for drug cases, when considered in light of the relaxed requirements in demonstrating the inadequacy of traditional investigative techniques.

The Supreme Court went even further in eroding the requirement to name persons who were the subjects of interceptions in *United States v. Donovan*.¹⁷⁹ The inadvertent failure to name two **known** persons who were subjected to wiretaps did not require suppression of their incriminating conversations even though the investigators had probable cause to believe they were involved in the gambling conspiracy, and that their conversations would be intercepted.¹⁸⁰ Additionally, lower courts have held that the naming of the wrong person on the wiretap application and order **will** not result in the suppression of evidence as long as the agents were not acting in bad faith.¹⁸¹ To further ease the administrative burden on investigators, the courts do not require an amended order every time an unknown person’s conversation is intercepted and the person thereby becomes known.¹⁸²

Donouan found that Congress did not intend that the requirement to identify persons subject to interception would “play ‘a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.’”¹⁸³ Other statutory requirements were left to fulfill that role. For example, in *United States v. Figueroa*,¹⁸⁴ the Second Circuit rejected the defendant’s challenge to wiretap evidence for failure to identify the persons subject to interception.¹⁸⁵ The court stated:

¹⁷⁶*Id.* at 158.

¹⁷⁷*Id.*

¹⁷⁸*Id.* at 153 n.12.

¹⁷⁹429 U.S. 413 (1977).

¹⁸⁰*Id.* at 438.

¹⁸¹*United States v. Kilgore*, 524 F.2d 957 (5th Cir. 1975).

¹⁸²*United States v. Principe*, 531 F.2d 1132, 1137 (2d Cir. 1976).

¹⁸³*Donovan*, 429 U.S. at 437 (quoting *United States v. Chavez*, 416 U.S. 562 (1974)).

¹⁸⁴757 F.2d 466 (2d Cir. 1985).

¹⁸⁵*Figueroa*, 757 F.2d at 473-75.

Surveillance under an order that authorizes interception of calls of 'others as yet unknown' is not strictly limited to only those who are specifically named in the authorizing order either as probable violators or as possible interceptees; this is particularly so where an investigation, such as this one, is directed at a wide-spread narcotics conspiracy.¹⁸⁶

The court went on to intimate that it would have given more serious consideration to the issue of minimization of the telephone calls to only pertinent conversations, if the defendant had raised it.¹⁸⁷ As will be shown in the next section, however, the courts have also eroded the minimization requirement, especially in **drug** investigations.

4. *Minimization.*

A key requirement of nonconsensual surveillance is found at Section 2518(5) of Title 111, which states, "the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception" ¹⁸⁸ Again, even though this "minimization" requirement seems strict, the Supreme Court, in *Scott v. United States*,¹⁸⁹ emasculated it, at least in cases where the investigation centers on the head of a major drug ring.

In *Scott*, the defendant was suspected of conspiring to import and distribute narcotics. After obtaining a wiretap, government agents intercepted all of Scott's telephone calls for a period of one month. Only forty percent of Scott's calls were related to narcotics transactions. Nevertheless, the Court stated that minimization could not be determined by blind reliance on percent-

¹⁸⁶*Id.* at 473; see also *United States v. Scott*, 436 U.S. 128, 140 (1978); *United States v. Manfredi*, 488 F.2d 588, 599 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974); *United States v. James*, 494 F.2d 1007, 1019 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).

¹⁸⁷*Figueroa*, 757 F.2d at 474-75.

¹⁸⁸18 U.S.C. § 2518(5) (1982). A parallel requirement for the Army is provided at AR 190-53, para. 2-1a(6), which requires a Request for Authorization to contain a statement of "the procedures to minimize the acquisition, retention, and dissemination of information unrelated to the purpose of the interception."

¹⁸⁹436 U.S. 128 (1978). The minimization requirement was included in Title III to comply with the fourth amendment prohibition against general searches. Critics of electronic surveillance have maintained that it is by nature inevitably indiscriminate and violative of the fourth amendment. See *United States v. Berger*, 388 U.S. 41, 64-67 (1967) (Douglas, J., concurring). Minimization would normally require electronic surveillance of a conversation to stop once the agents determine the conversation is not pertinent.

ages.¹⁹⁰ Instead, the Court adopted a standard of "reasonableness" and explained that "because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case."¹⁹¹ The Court found the proper approach for evaluating compliance with the minimization requirement was to objectively assess "the officer's actions in light of the facts and circumstances confronting him at the time."¹⁹² In *Scott*, these included the nature of a drug conspiracy, with its many participants,¹⁹³ the ambiguity of many calls, the use of coded and veiled language by drug dealers,¹⁹⁴ and the short duration of many of the nonpertinent calls.¹⁹⁵

In determining "reasonableness", the lower courts have generally considered three factors: the nature and scope of the criminal enterprise under investigation; the Government's reasonable inference of the character of the conversation from the parties to it; and the extent of judicial supervision.¹⁹⁶ The first factor takes into consideration the nature of largescale drug distribution networks. The second factor allows for greater latitude in listening to drug conversations, which often involve coded or veiled language. The third ensures that the adequacy of the investigator's conclusions are subject to independent judicial review.

A recent case illustrating the application of these factors to drug conspiracies is *United States v. Adams*.¹⁹⁷ Forty-six persons were indicted on charges alleging a widespread narcotics distribution network covering several counties in both New Jersey and

¹⁹⁰*Scott*, 436 U.S. at 140.

¹⁹¹*Id.*

¹⁹²*Id.*

¹⁹³*Id.* at 140-43. For other cases involving minimization issues and large-scale drug operations, see generally *United States v. Webster*, 734 F.2d 1048 (5th Cir. 1984); *United States v. Abascal*, 564 F.2d 821 (9th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), cert. denied, 433 U.S. 907 (1977); *United States v. Quintana*, 508 F.2d 867, 874 (7th Cir. 1975); *United States v. Bynum*, 485 F.2d 490, 501 (2d Cir. 1973); *Salzman v. State*, 49 Md. App. 25, 430 A.2d 847, 858 (1981).

¹⁹⁴*Scott*, 436 U.S. at 140-43. See generally *United States v. Figueroa*, 757 F.2d 466, 469-70 (2d Cir. 1985) (words "clothes," "two pairs of shoes," and "one shirt" were used to refer to different quantities of narcotics); *Poore v. State*, 39 Md. App. 44, 384 A.2d 103 (1978); and *supra* note 117.

¹⁹⁵*Scott*, 436 U.S. at 140-43.

¹⁹⁶*United States v. Hyde*, 574 F.2d 856 (5th Cir. 1978); *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976); *United States v. Daly*, 535 F.2d 434 (8th Cir. 1976); *United States v. Clemente*, 482 F. Supp. 102 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 207 (2d Cir. 1980); see also *United States Attorneys' Manual*, tit. 9, ch. 7, at 63-65 (May 9, 1984).

¹⁹⁷759 F.2d 1099 (3d Cir. 1985).

New York. The conspiracy operated under the cover of a purported charitable organization called "Concern for the Handicapped". The organization was located in a rented social club, and it sponsored several events to aid the elderly and the handicapped.¹⁹⁸ During the course of a properly authorized wiretap, the government agents intercepted 482 nonpertinent phone calls.¹⁹⁹ The Third Circuit held that this was not an unreasonably high number, considering the large number of participants in the conspiracy and the fact that coded language was often used.²⁰⁰

Another startling example of this wide latitude given drug investigators is *United States v. Rodriguez*,²⁰¹ where, as in *Scott*, all the phone calls were intercepted. Only six percent of the calls were incriminating and only fifteen percent were minimized; sixty percent of the calls were too short to minimize, and eighteen percent were unanswered or attempted calls.²⁰² In finding the number of nonpertinent calls intercepted to be reasonable, the court commented:

Where the subject telephone is located in the home of a person believed to be a principal in a major drug ring, agents may reasonably suspect that calls are drug related . . . the mere fact that named parties are not present does not require the agents to immediately terminate surveillance—normal minimization procedures still apply . . . this conspiracy involved a large number of participants in two states Therefore, the expectation that new participants might be identified at any time is not unreasonable, particularly when the subject telephone is thought to be a primary means of facilitating the distribution of cocaine.²⁰³

From these cases and others²⁰⁴ it becomes clear that, during drug

¹⁹⁸ *Id.* at 1105.

¹⁹⁹ *Id.* at 1115.

²⁰⁰ *Id.*

²⁰¹ 606 F. Supp. 1363 (D. Mass. 1985).

²⁰² *Id.* at 1369.

²⁰³ *Id.* at 1369-70.

²⁰⁴ Other cases permitting broad surveillance in drug cases are *United States v. King*, 335 F. Supp. 523, 541 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 896 (1973) (minimization reduced in order to discover the location of contraband); *United States v. Lanza*, 349 F. Supp. 929 (M.D. Fla. 1972) (out of the 4,098 phone calls intercepted, 31 percent had evidentiary value, 26 percent were nonpertinent, and 20 percent were busy signals, no answer, or wrong numbers); *State v. Andrews*, 125 N.H. 158, 480 A.2d 889 (1984) (out of 247 phone calls intercepted, 58 were incriminating, but 145 were nonpertinent and only 3 were minimized); *People v. Rezey*, 107 A.D.2d 850, 484 N.Y.S.2d 276 (1985); *Commonwealth v. Doty*, 345 Pa. Super. 374, 498 A.2d 870 (1985).

investigations, the court will allow tremendous latitude in the interception of calls that may turn out to be nonpertinent.²⁰⁵

5. Duration and Termination.

The courts have also allowed drug investigators broad discretion in determining the length of time that the subjects shall undergo electronic surveillance.²⁰⁶ Section 2518(1)(d) of Title III provides that the application for nonconsensual surveillance must contain

a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of conversation had been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter.²⁰⁷

Likewise, Section 2518(4)(e) requires the surveillance order to specify the length of time the interception may continue and whether it can last beyond the interception of the first pertinent communication.²⁰⁸ Section 2518(5) places an outer limit on the duration of the interception: "[N]o order ... may authorize or approve the interception of any ... communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days."²⁰⁹ The court, however, may extend the period indefinitely by issuing a series of renewal orders, each of which cannot exceed thirty days.²¹⁰ The time runs from the earlier of the day the agents begin surveillance, or ten days after the court enters the order.²¹¹

²⁰⁵ Administrative Office's Report on Applications For Orders, *supm* note 100, at 4, reported approximately 21% of the intercepted telephone conversations nationwide produced incriminating evidence.

²⁰⁶ See *infrm* note 215; see also Administrative Office's Report on Applications For Orders, *supm* note 100, at 3, which reported that the longest authorization was for 540 days in a federal racketeering investigation.

²⁰⁷ 18 U.S.C. § 2518(1)(d) (1982); see also AR 190-53, para. 2-1a (5).

²⁰⁸ 18 U.S.C. § 2518(4)(e) (1982); see also AR 190-53, para. 2-1a (5). Law enforcement officers must ensure that the order contains language on the permissible length of time for intercepting conversations.

²⁰⁹ 18 U.S.C. § 2518(5) (1982); see also AR 190-53, para. 2-1a (8).

²¹⁰ *Id.* To obtain renewal orders, however, the investigating agents must continue to satisfy the probable cause requirement that new and additional information will be uncovered on the extent of the drug conspiracy. See generally *United States v. Shakur*, 560 F. Supp. 318 (S.D.N.Y.1983).

²¹¹ Electronic Communications Privacy Act of 1986, Pub. L. 99-508, § 106(c), 100 Stat. 1848 (1986) (amending 18 U.S.C. § 2518(5)).

Not long after the passage of Title III in 1968, the courts held these provisions were not unconstitutional as a general search and that surveillance need not be limited to a single conversation. In *United States v. Cox*,²¹² the Eighth Circuit upheld lengthy electronic surveillance into a narcotics distribution network and reasoned that "an electronic search extending over a period of time will encompass overhearing irrelevant conversations, but the search of a building will likewise involve seeing and hearing irrelevant objects and conversations. We therefore reject the assertion that only single-conversation interceptions are permissible."²¹³ Indeed, the ongoing, secretive, and widespread nature of drug conspiracies may demand lengthy electronic surveillance in order to reach the otherwise insulated kingpin.²¹⁴ Therefore, under these statutory provisions and court decisions, drug investigators have been able to obtain the time needed to determine the ~~full~~ extent of drug conspiracies.

6. Other Statutory Requirements.

Title III contains other requirements with which the investigative agent must comply. These requirements include: reporting to the issuing judge on the progress of the **surveillance**,²¹⁵ recording the intercepts,²¹⁶ safeguarding and sealing evidence for submission to the judge,²¹⁷ preparing an inventory and providing notice to the subjects of the **intercept**,²¹⁸ and reporting information to the Administrative Office of the United States Courts.²¹⁹ These

²¹²462 F.2d 1293 (8th Cir. 1972).

²¹³*Id.* at 1304.

²¹⁴*United States v. Cohen*, 530 F.2d 43, 46 (5th Cir.), cert. denied, 429 U.S. 855 (1976) (contained provision that order would not automatically terminate upon obtaining of first intercept, but would continue until detail and participants of drug conspiracy were revealed); *United States v. Paeta*, 455 F.2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972) (permitted intercept to continue in narcotics case even though typist inadvertently "X-ed out" paragraph in order that interception was not to stop when communication of type described was first obtained); *United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985) (defendant had burden, in showing statutory violation, to present evidence that "at the end of the first week or two [of surveillance] the government had acquired all necessary evidence of the scope, participants, and method of the targeted operation and conspiracy"); *United States v. Shipp*, 578 F. Supp. 980, 987-88 (S.D.N.Y. 1984) (where 27 calls containing code phrases used in drug trade were intercepted during first 30-day period, then probable cause existed for wiretap extension order); *State v. Brennan*, 218 Neb. 454, 356 N.W.2d 861 (1984) (in drug conspiracy case, wiretap order was not invalid because it failed to state that surveillance would terminate upon achievement of objective).

²¹⁵18 U.S.C. § 2518(6) (1982).

²¹⁶*Id.* § 2518(8)(a).

²¹⁷*Id.*

²¹⁸*Id.* § 2518(8)(d).

²¹⁹*Id.* § 2519.

requirements, however, have no peculiar applications in relation to drug investigation, and are beyond the scope of this article.

III. INFORMANTS

A. *RECRUITING AND REWARDING*

Informants provide necessary information to law enforcement officials concerning the illicit trafficking in drugs. Their motivations are varied. Some are good citizens who want to see the law enforced or, who, in the military context, want to become military policemen or criminal investigators. Due to the special nature of drug investigations, however, many informants do not have the most laudable motives. Many desire to avoid punishment for past misconduct, to gain revenge, or to obtain money.²²⁰ Some are facing arrest and criminal charges. Consequently, Army criminal investigators and prosecutors must use extreme caution when handling and dealing with informants of questionable character.²²¹

Of those informants facing drug charges, the Government should provide no more of a reward than is absolutely necessary to obtain their cooperation in uncovering bigger drug dealers. Fortunately, drug offenses in the military carry stiff penalties.²²²

²²⁰Both CID and DEA regulations and guidelines provide for the payment of money to informers who provide useful information. See Dep't of Army, Criminal Investigation Div. Reg. No. 195-15, Criminal Investigation Informant Program, para. 2-6 (3 Nov. 1980) [hereinafter CID Reg. 195-15]; and Drug Enforcement Administration Domestic Operations Guidelines, 20 Crim. L. Rep. 3055, 3056 (1977). In contrast to the DEA's guidance, the Army envisions the use of paid informants only under unusual circumstances. The military courts have held that the payment of money to an informant to testify does not violate due process or public policy as long as the informant is not paid to testify in a certain way. *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975); *United States v. Baker*, 2 M.J. 360 (A.F.C.M.R. 1977).

Monetary reward for informants in the civilian sector is also provided by United States Customs laws. The Tariff Act of 1930, as amended, permits the awarding of 25% of the value of forfeited goods up to \$250,000 to informants who provide original information of custom law violations that leads to the seizure and forfeiture of the goods. 19 U.S.C. § 1619 (Supp. III 1985).

²²¹CID regulations provide a detailed methodology for handling and testing the reliability of informants. The regulation requires that a Crime Records Check (CRC) be performed within five days of recruiting a registered source. CID Reg. 195-15, para. 2-5b(8). The handler of the informant can further evaluate the reliability of the informant by sending him or her to another undercover CID agent who is unknown to the informant and poses as a drug dealer. The undercover agent provides the informant with prearranged bits of information which the informant must then accurately relay to the handler. *Id.* para. 2-5c(7).

²²²See Manual for Courts-Martial, United States, 1984, Part IV, para. 37e [hereinafter MCM, 1984].

In addition, the Assimilative Crimes Act²²³ permits Army prosecutors to charge federal drug offenses that are not specifically enumerated in the Uniform Code of Military Justice (UCMJ).²²⁴ For example, the use of a telephone to arrange a drug deal is a separate offense under federal law and is not included in the UCMJ.²²⁵ Thus, as the representative of the court-martial convening authority, the Army prosecutor has many bargaining chips when it comes time to negotiate pretrial agreements with an accused's defense counsel.

Another method the Government can use to obtain an accused's cooperation is the grant of testimonial immunity. Immunity should be granted only as a last resort, however. Prosecutors should try to obtain a conviction prior to granting immunity. The informant testifying under a grant of immunity provides the defense with a witness who can easily be impeached.²²⁶ The strict guidelines promulgated by the Department of Justice are useful to prosecutors who are contemplating a grant of immunity. They provide that before granting immunity the following factors should be considered:

- (1) the importance of the investigation or prosecution to effective enforcement of the criminal laws;
- (2) The value of the person's testimony or information to the investigation or prosecution;
- (3) The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- (4) The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his/her history with respect to criminal activity;
- (5) The possibility of successfully prosecuting the person prior to compelling him/her to testify or produce information; and

²²³ 18 U.S.C. § 13 (1982).

²²⁴ 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

²²⁵ 21 U.S.C. § 843(b) (1982). In appropriate cases, the Army trial counsel could also prosecute soldiers who were involved in large drug conspiracies under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1982 (1982) (RICO); the Continuing Criminal Enterprise statute, 21 U.S.C. § 848 (1982 and Supp. III 1985), and the Travel Act, 18 U.S.C. § 1952 (1982).

²²⁶ See United States Attorneys' Manual, tit. 9, ch. 11, at 9 (Mar. 23, 1984); S. Trott, *The Successful Use of Snitches, Informants, Coconspirators and Accomplices as Witnesses for the Prosecution in a Criminal Case* (1984).

(6) The likelihood of adverse collateral consequences to the person if he/she testifies or provides information under a compulsion order.²²⁷

Additionally, before immunity is granted in return for a guilty plea the Government should ensure the drug informant enters into a pretrial agreement that requires him or her to:

(1) Provide information concerning all past illegal drug activity and assets, not just specifics concerning ventures about which the government already has knowledge;

(2) Cooperate fully and completely with government agents and prosecutors;

(3) Testify truthfully before any grand jury proceeding and at all trials;

(4) Forfeit all drug-related assets; and

(5) Successfully complete a polygraph examination to confirm that all information provided is complete as well as truthful.²²⁸

At any trial in which the informant testifies, his or her compliance with the above agreement should successfully rebut any claim that the informant is lying in order to obtain leniency from the Government.

Despite these rewards and pressures, many persons charged with drug offenses refuse to cooperate due to fears of retaliation or concerns about self-incrimination. These reasons for failing to cooperate, however, have not prevented the Supreme Court from ruling, in *Roberts v. United States*,²²⁹ that the failure to cooperate and identify drug suppliers is a factor that may be considered in imposing a sentence:

The citizen's duty to raise the 'hue and cry' and report felonies to the authorities . . . was an established tenet of Anglo-Saxon law at least as early as the 13th century. . . Although the term 'misprision of felony' now has an archaic ring, **gross** indifference to the duty to report

²²⁷United States Attorneys' Manual, tit. 1, ch. 11, § 210, at 6 (Mar. 23, 1984).

²²⁸*Organized Crime Drug Enforcement Task Forces: Goals and Objectives, Excerpts from the Department of Justice First Annual Report of the Organized Crime Drug Enforcement Task Force Program*, 11 Drug Enforcement 3, 6 (Summer 1984) (Drug Enforcement is a quarterly publication of the Drug Enforcement Administration). The cited guidelines are used widely by U.S. Attorneys before granting immunity to informants in drug cases. *Id.*

²²⁹455 U.S. 552 (1980).

known criminal behavior remains a badge of irresponsible citizenship. . . . The petitioner . . . was asked to expose the purveyors of heroin in **his** own community in exchange for a favorable disposition of **his** case. By declining to cooperate, petitioner rejected an 'obligatio[n] of community life' that should be recognized before rehabilitation can begin.²³⁰

As a result, the prospects of an increased sentence provide further pressure on an accused to become an informant.

These rewards and pressures to become an informant, however, are ineffective unless the potential informant is somehow identified as having pertinent information to provide to the Government. One way for the Army to recruit informants would be to impose a legally enforceable obligation on all soldiers to prevent and report known illegal drug abuse by other Army personnel. Currently, the Army has not imposed any express duty on its soldiers to report drug abuse. The Air Force, however, has imposed such a duty and it was upheld in *United States v. Heyward*.²³¹

The Air Force regulation imposing this duty provided in pertinent part:

All Personnel:

a. Should encourage people known to have an existing or potential drug or alcohol abuse problem to seek assistance. When abuse exists, the proper unit commander must be notified at once. The commander must be fully advised of the circumstances, so that he or she may personally evaluate how the impact would affect the mission of the unit.

b. Report known or suspected incidents of illegal drug abuse to their immediate supervisor and unit commander, servicing security police agency, or local office of the AFOSI.²³²

The accused, Sergeant Heyward, ran afoul of this regulation when he failed to report the use of marijuana by junior enlisted airmen who were under his direct supervision. As a result, Sergeant Heyward was convicted of dereliction of duty.

²³⁰*Id.* at 557-58.

²³¹22 M.J. 35 (C.M.A.1986).

²³²Dep't of Air Force, Reg. No. 30-2, Social Actions Program, paras. 3-18a and b (22 June 1981).

On appeal, Sergeant Heyward argued that the duty to report illegal drug abuse violated his right against self-incrimination. The argument was based on the fact that, in at least three of the instances that Sergeant Heyward failed to report the drug abuse, he had himself participated in the use of marijuana. By compelling him to report others, the Government was also compelling Sergeant Heyward to report information that would lead to the discovery of his own drug abuse. The Air Force Court of Military Review rejected this argument and held that a noncommissioned officer who has knowledge of an airman's illicit drug abuse has a duty, imposed by both regulation and custom of military service, to report that drug abuse to a superior, and his failure to do so may result in a conviction for dereliction of duty.²³³

The rationale for rejecting Heyward's argument was that he was not required to report his own drug abuse. The fact that his reporting of other's drug abuse would possibly lead to an investigation of his own drug abuse was not due to the requirements of the regulation, but was due to Sergeant Heyward's own misconduct. The Air Force Court's rationale was further buttressed by the strong need of the military to combat drugs.²³⁴

The Court of Military Appeals, however, took a broader view of the right against self-incrimination, holding that it may excuse noncompliance with the reporting requirement if a person is already an accessory or principal to the illegal activity.²³⁵ Nevertheless, the court endorsed the general reporting requirement.²³⁶

The Army should promulgate a regulation similar to the Air Force's regulation. Presently, the closest the Army comes to imposing any similar reporting duties on its soldiers is in AR 600-20:

Noncommissioned officers disciplinary policies. (1) This subparagraph emphasizes the importance of noncommissioned officers in maintaining discipline in the Army (3) This function includes preventing incidents which would make it necessary to resort to trial by courts-

²³³“United States v. Heyward, 17 M.J. 942, 943-44 (A.F.C.M.R. 1984), *rev'd in part*, 22 M.J. 35 (C.M.A. 1986).

²³⁴*Id.* at 944-46.

²³⁵*Heyward*, 22 M.J. at 37.

²³⁶*Id.* But see *United States v. Reed*, 24 M.J. 80 (C.M.A. 1987) (questioning validity of Navy regulation that required sailors to report offenses committed by Navy personnel).

martial or to impose nonjudicial punishment Commissioned officers, warrant officers, noncommissioned officers, and petty officers of the Armed Forces are authorized and directed to quell **all** quarrels, frays, and disorders among persons subject to military law and to apprehend participants.²³⁷

Although these provisions seem to impose a general duty to prevent the commission of offenses, they do not directly address the need not only to prevent, but also to report drug offenses.

The failure of an officer to quell quarrels, frays, and disorders will likely come to the attention of superiors through complaining witnesses and military police (MP) reports. On the other hand, an officer's failure to prevent subordinates from engaging in illegal drug abuse will most likely not come to the attention of a superior. Again, drug offenses do not occur in public and there will not be a complaining witness, victim, or a disturbance which will catch the attention of the MPs. Accordingly, in the Army the need for a regulation requiring the reporting of drug abuse by others is imperative.

The Army should also consider amending the current "Limited Use Policy" to provide for full use immunity. The current "Limited Use Policy" generally restricts the use of evidence of drug abuse obtained through voluntary self-referrals of one's own illicit drug use, through a rehabilitation program, an emergency medical situation, or through command directed urinalysis (pursuant to reasonable suspicion of use and not probable cause) to determine a soldier's fitness for duty and need for counseling.²³⁸ The restriction prohibits the use of such evidence in court-martial or in adverse separation proceedings on the issue of characterization of service.²³⁹ Limited use evidence may be used to separate a soldier with an honorable discharge or to take other adverse administrative actions such as a letter of reprimand.²⁴⁰

By changing the policy to full use immunity, the issue of self-incrimination would be removed and the soldier could be lawfully ordered not only to report drug abuse of others, but also

²³⁷Dep't of Army, Reg. No. 600-20, Army Command Policy and Procedures, paras. 4-2g, 5-5 (20 Aug. 1986).

²³⁸Dep't of Army, Reg. No. 600-85, Personnel—General: Alcohol and Drug Abuse Prevention and Control Program, chs. 3 and 6 (3 Nov. 1986).

²³⁹*Id.*

²⁴⁰*Id.*

to report his own drug abuse.²⁴¹ Indeed, the Army's current policy of granting limited immunity for anyone who reports his own drug abuse, but at the same time imposing no legal obligation to report that abuse gives the soldier no incentive to come forward. The threat of criminal prosecution for failing to come forward would provide an incentive and might result in more soldiers seeking rehabilitation. Although the granting of the requisite use immunity might also result in some dealers coming forward and escaping prosecution, this drawback might be worth accepting, especially in light of the Army's ultimate goal, which is not to punish soldiers, but to eliminate ~~all~~ drug abuse. The granting of ~~full~~ use immunity would also not prohibit the Army from honorably discharging the soldier who is a drug abuser.

B. USING "REVERSE STINGS"

A major legal impediment to the effective use of not only informants, but also undercover law enforcement agents, is the Army CID's regulatory prohibitions against "reverse sting" operations in which the Government supplies the illicit drugs. This regulatory proscription provides:

Under no circumstances, even to facilitate investigative activity, will USACIDC personnel or personnel employed by USACIDC in drug suppression activities, engage in the illicit possession or distribution of controlled substances or direct that others do so.

Under no circumstances will USACIDC personnel or personnel assigned to drug suppression duties supply controlled substances to any source, suspect or subject for any purpose.²⁴²

The failure to permit the CID agent or the informant to supply contraband can in certain cases defeat the agent's or informant's ability to pose credibly as a drug dealer. This, in turn, hinders their capability to detect other drug dealers and thereby deprives the Government, in appropriate cases, of an effective law enforcement tool. The Supreme Court has specifically sanctioned the limited use of "reverse stings" as a necessary technique to uncover the drug trade. Unfortunately, the Court has not delineated to what extent the Government can participate in

²⁴¹*California v. Byers*, 402 U.S. 424 (1971); *Committee for GI Rights v. Callaway*, 370 F. Supp. 934, 939 n.3 (D.D.C.1974), *rev'd*, 518 F.2d 466, 475 (D.C.Cir. 1975); *United States v. Ruiz*, 48 C.M.R. 799 (C.M.A.1974).

²⁴²CID Reg. 195-8, paras. 2-13a and b.

criminal activity without violating the accused's rights to due process and fundamental fairness.

The Court's first pronouncement on the issue came in *Sorrells v. United States*,²⁴³ where Sorrells was convicted of two counts each of possessing and selling whiskey to an undercover agent named Martin in violation of the National Prohibition Act. Martin, who posed as a tourist, visited Sorrells' home and three times had to ask Sorrells to sell him the whiskey before Sorrells finally acceded to his request. In making these requests, Martin appealed to Sorrells' sense of loyalty to a fellow World War I veteran from the same fighting unit. The Court held that Sorrells had been entrapped as a matter of law and reversed his conviction.²⁴⁴

In reaching this holding, the Court unanimously recognized that "artifice and stratagem" may be employed by government agents to catch criminals.²⁴⁵ The majority, however, then decided the entrapment issue based upon what has now become known as "subjective" entrapment. The Court found that the criminal intent originated with the government agent, who had induced the otherwise innocent Sorrells to commit the crime.

More significantly, the majority rejected the opinion of the three concurring Justices that the case should be reversed because government misconduct in instigating crime should not be countenanced by the courts.²⁴⁶ This approach by the concurring Justices became known as "objective" entrapment. The criminal predisposition of the accused becomes totally irrelevant under this approach. The total focus is on the behavior of the Government.

The Court next confronted the entrapment issue in *Sherman v. United States*.²⁴⁷ Sherman and a government informant, Kalchinian, were both enrolled in a drug treatment program for their narcotics addiction. Kalchinian repeatedly asked Sherman to supply him with narcotics. In these requests, Kalchinian appealed to Sherman on the basis that he, Kalchinian, was not responding to treatment and needed the narcotics to end his suffering.²⁴⁸ The Court likewise reversed Sherman's conviction for selling narcotics on the basis of a subjective entrapment defense. Once again, though, the position of the minority of concurring Justices, who

²⁴³287 U.S. 435 (1932).

²⁴⁴*Id.*

²⁴⁵*Id.* at 441.

²⁴⁶*Id.* at 455 (Roberts, J., dissenting, joined by Brandeis and Stone, JJ.).

²⁴⁷356 U.S. 369 (1958).

²⁴⁸*Id.* at 371.

advocated an “objective” entrapment standard, was not adopted.²⁴⁹

Sorrells and *Sherman* can therefore be read as permitting the Government to engage in deception and undercover operations. The cases can further be interpreted as allowing the Government to provide a suspect the opportunity to commit the offense by suggesting its commission. The accused’s only available defense at this point would be subjective entrapment or, in other words, that he was not predisposed to commit the offense. In 1973, with the case of *United States v. Russell*,²⁵⁰ the Court faced not only the issue of government inducement of a criminal offense, but also with government participation in the offense.

In *Russell*, the defendant and his two cohorts were suspected of manufacturing methamphetamines or “speed.” To gain Russell’s confidence, Shapiro, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, went to Russell’s home and told Russell that he was with an organization that wanted to gain control of the manufacturing and distribution of speed. Shapiro then offered to supply Russell with a key scarce chemical (phenyl-2-propanone) used in the manufacture of speed in return for half of the speed that Russell produced. Through this deception, Shapiro was taken into Russell’s confidence and was able to view the laboratory where the drug was manufactured. Shapiro later returned with a search warrant and apprehended Russell. Russell was subsequently convicted of unlawfully manufacturing and processing methamphetamines.²⁵¹

In this case, a majority of the Court found that Russell was criminally predisposed and affirmed his conviction, relying solely on the subjective entrapment standard. Additionally, the Court held that the government’s conduct was not outrageous and “stop[ped] far short of violating that ‘fundamental fairness, shocking to the universal sense of justice mandated by the Due Process Clause.’”²⁵² The Court then explained the justification for allowing government participation in drug rings:

The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally

²⁴⁹*Id.* at 377-78 (Frankfurter, J., dissenting, joined by Douglas, Harlan, and Brennan, JJ.).

²⁵⁰411 U.S.425 (1973).

²⁵¹*Id.* at 426-27.

²⁵²*Id.* at 432.

manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them.²⁵³

The extent of permissible government participation in drug conspiracies still remained unclear. *Russell* left open the question of an objective entrapment defense based on a due process violation where the government's conduct may become so outrageous as to bar conviction.²⁵⁴ The providing of a scarce, but legal chemical was deemed to be permissible participation.

The next step in the progression of participation in illegal drug traffic came in *Hampton v. United States*.²⁵⁵ Hampton alleged that the confidential informant, Hutton, had supplied the heroin that Hampton had twice sold to two undercover DEA agents. Hampton admitted that he was criminally predisposed to make these sales. Therefore, the Court found no subjective entrapment defense existed, and further that an objective entrapment defense was not available under these facts.

The plurality opinion, written by Justice Rehnquist, totally rejected the existence of any objective entrapment defense.²⁵⁶ The concurring opinion, written by Justice Powell, yielded the necessary votes for a majority and, consequently, represents the current state of the law. It found the fact that in *Russell* a legal (although scarce) substance was supplied, whereas in this case an illegal drug, heroin, was provided, to be a distinction without a difference. It also reaffirmed *Russell* and found the government's conduct permissible in this case, but again, unlike Rehnquist's opinion, left open the question of whether the objective entrapment defense would be available in some future case.²⁵⁷

²⁵³ *Id.*

²⁵⁴ *Id.* at 431-32.

²⁵⁵ 425 U.S. 484 (1976).

²⁵⁶ *Id.* at 489.

²⁵⁷ *Id.* at 491-93 (Powell, J., concurring).

The concurring opinion conceded that trying to prescribe specific limitations on police conduct was difficult and that many factors would have to be considered.²⁵⁸ As to narcotics cases, however, Justice Powell gave the following guidance:

I emphasize that the cases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement. One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanded narcotics traffic, [citations omitted], which is one of the major contributing causes of escalating crime in our cities. [citations omitted] Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.²⁵⁹

This quote and the concurring opinion were subsequently endorsed by the Court of Military Appeals in *United States v. Vanzandt*.²⁶⁰ In summarizing the law, Chief Judge Everett wrote that "the Supreme Court has moved to a position that the subjective test for entrapment is paramount to the exclusion of the objective test—except for that unique, peculiar situation where the conduct of the government agents reaches the point of shocking the judicial **conscience**."²⁶¹ Chief Judge Everett further noted that reasonable suspicion was not a necessary prerequisite to targeting a subject of an undercover operation.²⁶²

Although in general terms the law on objective entrapment is clear, the specific conduct that investigators may or may not engage in remains unclear. The government's conduct must not be

²⁵⁸*Id.* at 494 nn. 5-6.

²⁵⁹*Id.* at 495 n.7.

²⁶⁰14 M.J. 332 (C.M.A. 1982).

²⁶¹*Id.* at 343. Chief Judge Everett further emphasized Justice Powell's sentiment:

The latitude given the Government in 'inducing' the **criminal** act is considerably greater in contraband cases . . . —which **are** essentially 'victimless' crimes—than would be permissible as to other crimes, where commission of the acts would bring injury to members of the public. It would appear that, in giving such latitude, courts recognize that the Government needs more leeway in detecting and combating these illicit enterprises.

Id. at 344.

²⁶²*Id.* at 343.

aimed at inducing otherwise innocent persons to commit a crime, and the actual predisposition of the perpetrator is irrelevant.²⁶³ In determining the existence of an objective entrapment defense and in judging the tolerable limits of police conduct in drug investigations, several factors can be gleaned from the opinions of the Supreme Court Justices who were the proponents of a strict and exclusive objective entrapment standard.

First, is the substance to be provided by law enforcement agents or government informants legal or **illegal**?²⁶⁴ This factor, however, was found to be irrelevant by a majority of the Court in *Hampton*. Second, if the Government does not supply the drug or substance, will the suspect obtain it from a source other than the Government?²⁶⁵ A drug or substance readily available from other sources will weigh against any possible objective entrapment defense. Third, was the suspect an active participant in an ongoing drug enterprise prior to the government's intervention.²⁶⁶ For example, in *Hampton* the defendant was known to have engaged in only the trafficking offense set-up by the confidential informant, whereas in *Russell* the defendant was suspected and shown to be engaged in a continuing manufacturing scheme; of course, this prior involvement weighed heavily against any entrapment defense.

To these can be added a fourth factor implicit throughout these Court decisions: Is the Government's participation necessary to detect the drug offense being committed?²⁶⁷ If a suspect has a

²⁶³*Sherman*, 356 U.S. at 384 (Frankfurter, J., concurring).

²⁶⁴*Hampton*, 425 U.S. at 497 (Brennan, J., dissenting).

²⁶⁵*Id.* at 496 n.1 (citing *United States v. West*, 511 F.2d 1083, 1086 (3d Cir. 1975), and *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971)) *Russell*, 411 U.S. at 439 (Stewart, J., dissenting).

²⁶⁶*Hampton*, 425 U.S. at 498.

²⁶⁷*Id.* at 499 n.3. As an example, assume an undercover agent would have approached the accused in *Russell* and attempted to buy speed without offering any ingredient for the manufacturing process. Russell no doubt might have been suspicious and refused to make the sale. However, by offering Russell a scarce ingredient in the manufacturing process, the undercover agent could thereby gain his confidence.

Other cases have also delineated four factors to consider in determining objective entrapment. They are "the need for the type of police conduct, the impetus for the scheme, the control the Government exerted over the criminal enterprise, and the impact on the commission of the crime." *United States v. Robinson*, 763 F.2d 778 (6th Cir. 1985). The instigation factor is of little value since most undercover drug investigations use government instigation and this factor is adequately considered in the subjective entrapment defense. *See United States v. Twigg*, 588 F.2d 373, 388 n.21 (3d Cir. 1978) (Adams, J., dissenting).

Generally, all these cases involving objective entrapment issues take a case-by-case, totality-of-the-circumstances approach with no single factor controlling

ready supply of drugs, then the Government should first consider a controlled buy. If this approach is impractical because the suspected drug dealer is too insulated, or is unknown, or for some other valid reason, law enforcement agents may resort to actually supplying the contraband.

Although many of these factors have been rejected by a majority of the Court as constituting a defense, they do provide drug investigators with some useful specific guidance on the extent of permissible government participation in the drug trade. Further guidance can be found in lower court cases decided after *Hampton*.

In *United States v. Mazzella*,²⁶⁸ undercover DEA agents advertised, in a magazine oriented toward drug users, the sale of legal chemicals and equipment used in the manufacture of methamphetamines. After the defendant, Mazzella, placed his order, a DEA agent, disguised as a United Parcel Service driver, delivered the packages to Mazzella's address. Once Mazzella took possession of the packages, he was arrested for attempted manufacture of methamphetamines, and his subsequent conviction for this offense was upheld.²⁶⁹

Other recent cases illustrate how effective and useful confidential informants can be in setting up "reverse sting" operations. In one case, *United States v. Porter*,²⁷⁰ the DEA used an informant to telephone repeatedly a suspected drug dealer. The phone calls were recorded and later received into evidence at trial. In these phone calls, the informant asked the defendant, a suspected drug dealer, to find some buyers for 10,000 pounds of marijuana that the informant wanted to sell. The Government then provided the informant with the 10,000 pounds of marijuana, which was sold to buyers who were found by the defendant. Upon completion of the transaction, the defendant was arrested; his later conviction was likewise upheld.

In another recent case, *United States v. O'Connor*,²⁷¹ the DEA used an informant's debt of \$1,200,000 to the defendants, who were also suspected drug dealers, as basis for their sting operation. The informant advised the defendants that he would repay the debt in cocaine. The DEA then provided the informant

United States v. Mazzella, 768 F.2d 235 (8th Cir. 1985); *United States v. Tobias*, 662 F.2d 381, 386 (5th Cir. 1981).

²⁶⁸ 768 F.2d 235 (8th Cir. 1955).

²⁶⁹ *Id.* at 236.

²⁷⁰ 764 F.2d 1 (1st Cir. 1985).

²⁷¹ 737 F.2d 814 (9th Cir. 1984).

with 30 kilograms of cocaine to give to the defendants at a prearranged location in Tucson, Arizona. After videotaping the defendants' taking possession, the DEA agents apprehended them; they were convicted of wrongful possession of cocaine with intent to distribute.

Other recent federal²⁷² and state²⁷³ cases have upheld similar drug sting operations. Only where the government completely controls the criminal **enterprise**,²⁷⁴ or where it engages in coercion

²⁷²*United States v. Rivera*, 778 F.2d 591 (10th Cir. 1985) (upheld government-established drug distribution network where agents posed as foreign dealers, and made proposals to buy defendant's automobiles and condominiums and to use real estate services, as an inducement to defendant to buy drugs); *United States v. Bounos*, 730 F.2d 468 (7th Cir. 1984) (DEA undercover agent offered to supply drug conspirators with cocaine); *United States v. Romano*, 706 F.2d 370 (2d Cir. 1983) (confidential informant telephoned defendant in Italy, offering to sell him heroin which was later supplied by DEA); *United States v. Rodriguez-Ramos*, 704 F.2d 17 (1st Cir. 1983) (government undercover agents repeatedly instigated meetings and telephone conversations used to bring about drug conspiracy), *cert. denied*, 463 U.S. 1209 (1983); *United States v. Rogers*, 701 F.2d 871 (11th Cir. 1983) (DEA agents, through their informants who were selling the marijuana, offered to lower the price, put defendants up in hotel room, and furnish them with women; court found this was not outrageous conduct); *United States v. Spitz*, 678 F.2d 878 (10th Cir. 1982) (DEA supplied chemicals to defendant with preexisting interest in manufacturing speed; conviction upheld even though no prior ongoing enterprise); *United States v. Tobias*, 662 F.2d 381 (5th Cir. 1981) (DEA establishment of chemical and lab equipment supply company, advertisement of chemical supplies in "High Times" magazine, encouragement of drug manufacturing novice to switch from cocaine to PCP because it was easier to make, and advising drug novice on 13 occasions on how to manufacture PCP, was not outrageous conduct or overinvolvement); *United States v. Leja*, 563 F.2d 244 (6th Cir. 1977) (government informants provided defendants with chemicals and technical instructions to manufacturer PCP).

²⁷³*Curtis v. State*, 172 Ga. App. 473, 323 S.E.2d 684 (1984) (undercover government agent's receipt of 10% bounty from civil forfeiture resulting from his work, his offering of a free "sample" of the marijuana, his selling of one pound of the marijuana, and his pressuring defendant to buy it, was not outrageous); *State v. Pleasants*, 38 Wash. App. 78, 684 P.2d 761 (1984) (conduct of undercover officers in stating that they would accept applications for construction work employment and then asking defendant to procure marijuana was upheld); *State v. Bass*, 451 So.2d 986 (Fla. Dist. Ct. App. 1984) (undercover government agent, through informant, sold marijuana); *People v. Johnson*, 123 Ill. App. 3d 363, 462 N.E.2d 948 (1984) (undercover narcotics agent's conduct in frequenting house of prostitution and asking defendant to sell him cocaine was not outrageous); *People v. Demasi*, 132 Cal. App. 3d 89, 182 Cal. Rptr. 885 (1982) (upheld sale of drugs by undercover police).

²⁷⁴*United States v. Kett*, 722 F.2d 687 (11th Cir. 1984) (although government agent may provide something of value to drug enterprise, he may not instigate criminal activity, provide place, equipment, supplies and know-how, and run the entire operation with only meager assistance from defendant); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) (DEA agent suggested establishment of speed laboratory, supplied some glassware and an indispensable ingredient, purchased all supplies, provided isolated farmhouse for locating lab, and providing know-how for manufacturing, constituted police overreaching and barred prosecution); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). *But see United States v. Porter*, 764

or threats of physical bodily harm,²⁷⁵ or some other reprehensible **conduct**,²⁷⁶ have the courts indicated that a violation of due process will occur.

Two Air Force cases, *United States u. Harms*²⁷⁷ and *United States u. Simmons*,²⁷⁸ have demonstrated how successful “reverse sting” operations can be in military drug cases, especially when combined with electronic surveillance. In both cases, Air Force investigators posed as large-scale drug dealers and established a base of operation in a local hotel room. Through various methods, the word was put out to suspected dealers on base that the undercover agents had marijuana to sell. The accused then approached the undercover agents and purchased a little over a pound of marijuana each. After the transaction had been video-taped and completed, the agents apprehended the accused. In upholding the “reverse sting,” the court stated it was justified as a necessary means of “discovery and suppression of ongoing illicit traffic in **drugs**.”²⁷⁹

These Air Force cases also illustrate the power of electronic surveillance combined with reverse sting operations, especially the use of video surveillance. Video surveillance alone, without the acquisition of oral or wire communications, is not covered in Title III, and the usual fourth amendment principles govern its use.²⁸⁰ Where audio recordings are made in conjunction with the video recordings, then Title III must be complied with as well.²⁸¹ However, as discussed previously, neither Title III nor the fourth amendment applies to conversations where one of the parties consents to the recording. An accused has no reasonable or justifiable expectation of privacy that a person in whom he confides will not reveal the conversation.²⁸²

As a result, courts have upheld the admissibility of videotapes of reverse sting operations conducted by undercover agents and

F.2d 1,9 n.4 (1st Cir. 1985), which questions the continued vitality of *Twigg*.

²⁷⁵*Porter*, 764 F.2d at 8; *United States v. Belzer*, 743 F.2d 1213, 1217 (7th Cir. 1984); *Greene*, 454 F.2d at 783.

²⁷⁶*State v. Glosson*, 441 So. 2d 1178 (Fla. Dist. Ct. App. 1983) (prosecutor's promise to pay informant, contingent upon his successfully testifying against others to whom he was to sell cannabis provided by sheriff's department, violated due process).

²⁷⁷14 M.J. 677 (A.F.C.M.R. 1982).

²⁷⁸14 M.J. 624 (A.F.C.M.R. 1982).

²⁷⁹*Harms*, 14 M.J. at 678.

²⁸⁰*United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984).

²⁸¹*Id.*; see also *United States Attorneys' Manual*, tit. 9, ch. 7, at 102-07 (May 9, 1984) (provides sample authorization application and order for video surveillance).

²⁸²*United States v. White*, 401 U.S. 745, 751-53 (1971).

informants. The fact that the video equipment is installed and concealed on the premises rather than on the person is of no consequence, as long as the party consenting to the recording has ownership or control over the premises.²⁸³ Additionally, it should be noted that the party consenting to the recording does not actually have to participate in the conversation or transaction, as long as he or she is present and his or her presence is known to the nonconsenting party.²⁸⁴ Thus if an informant consented to government agents videotaping a drug transaction in the informant's room, but the informant merely introduces the government agent to the suspect and takes no part in the transaction, the consent and recording would still be valid.

The use of reverse sting operations involves technical legal questions as well as sensitive policy decisions. The Army CID agent in the field should not be permitted to determine when or to what extent the government will become involved in supplying contraband to suspected drug dealers. On the other hand, the Army's absolute prohibition on the supplying of contraband by either agents or informants forecloses a needed and useful weapon in ferreting out drug dealers. For these reasons, consideration should be given to permitting approval of reverse sting operations on the same basis that this article has proposed for the approval of consensual electronic surveillance. The vesting of this approval authority in the Commander, USACIDC, for operations occurring in the United States, and in the Regional Commander of CID for operations occurring in overseas areas, will interpose a sufficiently detached and mature judgment. Also, specific guidelines, to include the four factors previously mentioned, could be promulgated to aid these commanders in their decisions.²⁸⁵ Another advantage to having the same approval authority is that reverse stings involving consensual electronic surveillance could be authorized at one time.

C. PROTECTING THE INFORMANT

The Government enjoys an important, but sometimes not fully exercised, privilege to protect the identity of its sources and

²⁸³State v. Jennings, 101 Idaho 265, 611 P.2d 1050 (1980) (undercover agents installed equipment in motel room behind two-way mirror from where agents were able to observe defendant delivering heroin).

²⁸⁴United States v. Coven, 662 F.2d 162, 173 (2d Cir. 1981).

²⁸⁵It should be noted that the Administrator of the DEA has authority to approve reverse sting operations. For the guidance provided the DEA Administrator in making these decisions, see *Drug Enforcement Administration Domestic Operations Guidelines*, 20 Crim L. Rep. 3055, 3058 (Feb. 2, 1977).

informants. This privilege is based upon Supreme Court precedent²⁸⁶ that has been incorporated into Military Rule of Evidence 507:

(a) The United States ... has a privilege to refuse to disclose the identity of an informant. An informant is a person who has furnished information resulting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime. Unless otherwise privileged ..., the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.²⁸⁷

Rule 507(c) goes on to provide several key exceptions to this privilege:

(1) ... No privilege exists ... (A) if the identity of the informant has been disclosed to those who would have a cause to resent the communication by a holder of the privilege or by the informant's own action; or (B) if the informant appears as a witness for the prosecution.

(2) *Testimony on the issue of guilt or innocence.* If a claim of privilege has been made ..., the military judge shall ... determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears ... that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) *Legality of obtaining evidence.* If a claim of privilege has been made ... with respect to a motion [to suppress evidence obtained as a result of an illegal search and seizure], the military judge shall ... determine whether disclosure of the identity of the informant is required by the Constitution. ...²⁸⁸

²⁸⁶ *Roviaro v. United States* 353 U.S. 53 (1957).

²⁸⁷ Mil. R. Evid. 507(a).

²⁸⁸ Mil. R. Evid. 507(c).

The rationale justifying this privilege is the government's need to obtain information about crimes while at the same time protecting the informant from physical harm and **reprisals**.²⁸⁹ The privilege belongs to the government and not the informant; the term informant's privilege is really a misnomer for what is actually the government's privilege in the informant's identity.²⁹⁰

To obtain disclosure of the informant's identity, the defense must make a motion, since the military judge does not have a *sua sponte* duty to compel disclosure.²⁹¹ No fixed rule on disclosure exists, and whether the judge will compel disclosure will depend on the facts of each case.²⁹² The defense will generally seek disclosure of the informant's identity in two situations: on the issue of the legality of a search and seizure, or on the issue of guilt or innocence. Only in the rare case will the Government be required to disclose the identity of an informant on the issue of the legality of a search and seizure, because generally only the information provided to the authorizing official is relevant to the probable cause determination.²⁹³ The fact that the informant provided the information that led to the search, or, in short, was the mere tipster, is not alone sufficient to compel **disclosure**.²⁹⁴

To compel disclosure and successfully suppress the evidence from a search, the defense must first make a substantial showing that a government agent made a false statement, either intentionally or with reckless disregard for the truth, to the authorizing official.²⁹⁵ A confidential informant is not a government agent, and the fact that he lied to the government agent does not vitiate the legality of the search authorization.²⁹⁶ The false statement

²⁸⁹*Roviaro*, 353 U.S. at 59; *State v. Port Clinton Fisheries*, 12 Ohio St. 3d 114, 465 N.E.2d 865 (1984).

²⁹⁰*Mil. R. Evid.* 507(b); *Roviaro*, 353 U.S. at 59.

²⁹¹*Mil. R. Evid.* 507(b) (2) and (3), which state "upon motion of the accused."

²⁹²*Roviaro*, 353 U.S. at 59.

²⁹³*Mil. R. Evid.* 311(g) (1).

²⁹⁴*United States v. Coleman*, 14 M.J. 1014 (A.C.M.R. 1982) (government not required to disclose identity of informant whose tip that defendant had stolen M-16 rifle provided probable cause for search); *United States v. Adolph*, 13 M.J. 775 (A.C.M.R. 1982) (government not required to disclose identity of informant who provided tip that defendant had marijuana in his car even though defendant claimed that informant might have planted the marijuana); *United States v. Bennett*, 3 M.J. 903 (A.C.M.R.), *review denied*, 4 M.J. 254 (C.M.A. 1978).

²⁹⁵*Mil. R. Evid.* 311(g) (2).

²⁹⁶*Colorado v. Nunez*, 465 U.S. 324, 327 (1984) (White, J., joined by Burger, C.J., and O'Connor, J., concurring); *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *McCray v. Illinois*, 386 U.S. 300 (1967).

must then be shown to be material.²⁹⁷ Only after these showings is the defense entitled to a preliminary hearing on the issue.²⁹⁸

At the preliminary hearing the defense must prove by a preponderance of the evidence that the false statement was made. After this fact is proved, the Government has the burden to show that the false statement was not material.²⁹⁹ The dilemma for the defense is that they need to know the identity of the informant in order to prove that the agent lied to the authorizing official concerning what the informant told him or her. At some point during the hearing, if the judge feels the government agent is not being reliable or credible, the Constitution may require the disclosure of the informant's identity.³⁰⁰ Generally, the Government can preclude disclosure if the falsity was not material or was not necessary to a finding of probable cause.³⁰¹ Moreover, trial counsel may be able to preclude disclosure to the accused by first disclosing the informant's identity to the military judge. The judge, in an in camera proceeding, can then interview the informant without the presence of defense counsel,³⁰² or with the defense counsel present, but sworn to secrecy, and without the accused's presence.³⁰³ If the judge determines that the government agent was being truthful or was merely negligent about what the informant said to him or her, then disclosure of the informant's identity would not be compelled.³⁰⁴

The above procedure places the accused at a disadvantage because he or she usually cannot make a substantial preliminary showing to obtain a hearing without knowing and presenting the informant's testimony, which then will be used to show the agent's false statement. The in camera proceeding does, however, provide some protection to the defense against the lying government agent. On the other hand, the procedure also protects

²⁹⁷Mil. R. Evid. 311(g) (2).

²⁹⁸*Id.*

²⁹⁹*Id.*

³⁰⁰*Franks v. Delaware*, 438 U.S. at 170; *McCray v. Illinois*, 386 U.S. at 305. See generally *United States v. Colter*, 15 M.J. 1032 (A.C.M.R. 1983) (defendant made substantial preliminary showing of falsity and military judge should have granted hearing on legality of search authorization).

³⁰¹*Franks v. Delaware*, 438 U.S. at 170; *McCray v. Illinois*, 386 U.S. at 305; *United States v. Gill*, 623 F.2d 540 (8th Cir. 1980); *United States v. Callaghan*, 445 F. Supp. 1296 (D.N.J. 1978).

³⁰²See generally *United States v. Hunter*, 17 M.J. 738 (A.C.M.R. 1983).

³⁰³*United States v. Varela*, 692 F.2d 1352, 1356 n.1 (11th Cir. 1982); *Gaines v. Hess*, 662 F.2d 1364, 1366-69 (10th Cir. 1981); *United States v. Ayala*, 643 F.2d 244, 246-47 (5th Cir. 1981); *Hunter*, 17 M.J. at 739-40.

³⁰⁴*United States v. Ordonez*, 737 F.2d 793, 809-10 (9th Cir. 1984); *United States v. Anderson*, 509 F.2d 724, 729-30 (9th Cir. 1974).

informants from attempts by accused to threaten and coerce them into changing their testimony. Likewise, ongoing investigations are not compromised. Thus, the Government in most cases should be able to protect successfully the identity of the informant from disclosure on a suppression motion.

The courts have been much more prone to require government disclosure where the issue is one of guilt or innocence.³⁰⁵ The courts have generally held that the identity of an informant who participates in the drug transaction must be disclosed.³⁰⁶ These holdings have sprung from the leading precedent, *Roviaro v. United States*,³⁰⁷ where the government agents had the defendant, a suspected drug dealer, under visual surveillance as well as audio surveillance through an agent secreted in the informant's car. At the time Roviaro sold the heroin to the informant, however, the transaction occurred away from the car and beyond the agents' surveillance. The majority of the Court held that the identity of the informant must be disclosed, even though the evidence clearly indicated that Roviaro already knew the informant's identity.

Little consideration in this decision was given to the difficulty of otherwise detecting drug transactions. Accordingly, the dissenting opinion by Justice Tom Clark is more persuasive in writing:

It is well to remember that the illegal traffic in narcotic drugs poses a most serious social problem. One need only read the newspapers to gauge its enormity. No crime leads more directly to the commission of other offenses. Moreover, it is a most difficult crime to detect and prove. Because drugs come in small pills or powder and are readily packaged in capsules or glassine containers, they may be easily concealed. They can be carried on the person or even in body crevasses where detection is almost impossible. Enforcement is therefore most difficult without the use of "stool pigeons" or informants. Their use has long had the approval of the courts. To give them protection governments have always followed a policy of nondisclosure of their identities. Experiences teaches that once this policy is relaxed . . . its effectiveness is de-

³⁰⁵*McCray v. Illinois*, 386 U.S. 300, 305-08 (1967).

³⁰⁶*Roviaro v. United States*, 353 U.S. 53, 63-65 (1957); *Ayala*, 643 F.2d at 246-47; *United States v. Barnett*, 418 F.2d 307, 311-12 (6th Cir. 1969); *Gilmore v. United States*, 256 F.2d 565, 567 (5th Cir. 1958). *But* see *Pennyman v. State*, 333 S.E.2d 659 (Ga. App. 1985) (identity of informant who was participant in drug transaction did not have to be disclosed where defendant already knew his identity).

³⁰⁷353 U.S. 53 (1957).

stroyed. Once an informant is known the drug traffickers are quick to retaliate. Dead men tell no tales.³⁰⁸

Based on this rationale, Justice Clark would limit disclosure to situations where the informant's identity is essential to a fair trial.³⁰⁹ The fact that the informant was the sole participant in the transaction would not compel disclosure. In Justice Clark's opinion, the defenses raised in the majority opinion were pure speculation. Nonetheless, the lower courts have given little consideration to the unique nature of drug offenses, and have followed the majority's standard of whether the informant's identity will be "relevant and helpful" to the defense case. This standard will generally require disclosure of an informant who was a participant in a drug transaction. Despite this standard, the nature of the offense is still a factor and the prosecution must be fully prepared to demonstrate at an in camera proceeding at trial how disclosure will compromise an ongoing drug investigation or threaten the informant with physical harm.

Where the informant does not participate in the transaction, but introduces the undercover government agent and witnesses the suspect sell drugs to the agent, the courts will usually require disclosure of the informant's identity as a material witness who could potentially rebut the undercover agent's testimony. The informant in this situation might be "relevant and helpful" in establishing an entrapment or mistaken identity defense.³¹⁰ Where the informant would not be relevant and helpful to defendant's case, however, disclosure of identity would not be required, even though the informant witnesses the drug transaction.³¹¹ Finally,

³⁰⁸ *Id.* at 66-67.

³⁰⁹ *Id.* at 69.

³¹⁰ *Gaines v. Hess*, 662 F.2d 1364 (10th Cir. 1981) (informant potentially relevant to mistaken identity in drug sale); *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978) (relevant to mistaken identity defense); *State v. Outlaw*, 104 Wis. 2d 231, 311 N.W.2d 235 (1981) (relevant to mistaken identity defense); *People v. Castro*, 63 App. Div. 2d 891, 405 N.Y.S.2d 729 (1978) (informant necessary to resolve agent's credibility where agent had stated informant did not witness the controlled buy and the informant's statement indicated that he did); *Commonwealth v. Herron*, 475 Pa. 461, 380 A.2d 1228 (1977) (relevant to mistaken identity defense).

³¹¹ *United States v. Russotti*, 746 F.2d 945 (2d Cir. 1984) (confidential informant was not relevant on the issue of agent's credibility); *United States v. Anderson*, 627 F.2d 161 (8th Cir. 1980) (informant was not relevant to mistaken identification defense where the informant had only witnessed one of a series of transactions of heroin); *United States v. Magruder*, 514 F.2d 1288 (5th Cir. 1975) (identity of informant, who did not buy any of the heroin, had not participated in any negotiations, and was only one of several witnesses, did not have to be disclosed); *James v. State*, 280 Ark. 359, 658 S.W.2d 382 (1983) (no showing that informant who witnessed drug distribution would be relevant; informant had also been threatened and his residence destroyed by fire); *Howard v. State*, 144 Ga. App.

where the informant merely introduces the agent to the **drug** dealer, and then does not witness or hear any of the transactions, his or her presence alone is usually not sufficient to compel disclosure.³¹²

Even if disclosure is ordered, the Government may not necessarily be required to produce the informant for trial as a defense witness.³¹³ In making disclosure, the Government need **only** provide the defense with the information on identity that is in the government's possession.³¹⁴ If the informer is an unknown, anonymous tipster, the Government could not possibly disclose his or her identity.³¹⁵ The Government cannot deliberately fail to inform itself of an informant's identity in order to protect it from disclosure.³¹⁶ Once the informant's known identification and location are provided, the Government must make reasonable efforts to produce him or her for trial.³¹⁷

Many times the prosecution is required to produce the informant not only for the defense's case but also in order to perfect its own case. Although as noted, Rule 507 expressly states that the privilege is waived when the informant appears as a witness for the Government, the informant can still be protected by limiting the defense's cross-examination. Many courts have held that the defense can be prohibited from inquiring into the

208, 240 S.E.2d 908 (1978)(introducing the agent and witnessing the sale were not sufficient to require disclosure); *State v. Perez*, 438 So. 2d 436 (Fla. Dist. Ct. App. 1983)(not relevant to entrapment).

³¹²*United States v. Toombs*, 497 F.2d 88, 93 (5th Cir. 1974); *State v. Gilchrist*, 71 N.C. App. 180, 321 S.E.2d 445 (1984)(introducing and remaining present during drug transactions were insufficient to compel disclosure of identity); *Lewandowski v. State*, 271 Ind. 4, 389 N.E.2d 706 (1979); *Greene v. State*, 134 Ga. App. 658, 215 S.E.2d 536 (1975)(informant merely stood by and was not a material witness); *People v. Pena*, 376 N.Y.S.2d 452, 339 N.E.2d 149 (1975).

³¹³*Fitzpatrick v. Procunier*, 750 F.2d 473 (5th Cir. 1985)(prosecutor must make a reasonable effort to produce informant when judge has ordered disclosure); *United States v. Nuttle*, 550 F.2d 701 (1st Cir. 1977); *United States v. Hart*, 546 F.2d 798 (9th Cir. 1976).

³¹⁴*Self v. State*, 420 So. 2d 803 (Ala. Crim. App. 1982); *Varela v. State*, 561 S.W.2d 186 (Tex. Crim. App. 1978).

³¹⁵*United States v. Ruiz-Juarez*, 456 F.2d 1015 (9th Cir. 1972); *State v. Turner*, 543 S.W.2d 270 (Mo. Ct. App. 1976)(holding that in the absence of a showing that prosecution connived to procure absence of informant, no affirmative duty existed to search for informant).

³¹⁶*United States v. Oropeza*, 275 F.2d 558 (7th Cir. 1960); *People v. White*, 57 App. Div. 2d 967, 395 N.Y.S.2d 73 (1977).

³¹⁷See *supra* note 313. In light of *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the Government could argue that the informant would not have to be produced at trial unless the expected testimony was both material and favorable to the defense.

informant's present address, location, or employment.³¹⁸ In these situations, however, the Government can neither conceal the informant's true identity³¹⁹ nor prevent the defense from inquiring into the bias and motive to lie, such as by any pay, immunity, or leniency the informant may have received from the Government.³²⁰ Likewise, the Government must disclose **all** the informant's prior statements, which can then be used to impeach his in-court testimony.³²¹

The above problems of protecting the informant from physical harm, from testifying at trial, and from undergoing cross-examination and impeachment can best be accomplished through the use of a wired informant and the recording of the illicit drug transaction. With a wired informant, the defense will not be able to make any showing that would attack the veracity of a government agent who used this form of evidence to obtain a search warrant. To obtain a valid search warrant based upon the word of an informant, the authorizing magistrate will consider both the informant's basis of knowledge and veracity in determining whether probable cause exists.³²² Electronically monitored conversations between an informant and a **drug** dealer will satisfy both the basis of knowledge and veracity prongs necessary for a valid search warrant.³²³ In this manner, the informant will never

³¹⁸*United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (defense must show that the address and present location of the informant is highly relevant before Government can be compelled to disclose them, even where identity of informant is known); *United States v. Napolitano*, 761 F.2d 135, 138-39 (2d Cir. 1985), *aff'g* 552 F. Supp. 465 (S.D.N.Y. 1982) (the defense has no right to inquire into whether informants were in the federal Witness Protection Program, because disclosure of such information would endanger informants' safety); *United States v. Toner*, 728 F.2d 115, 122 (2d Cir. 1984) (cross-examination into informant's reasons for first coming to the FBI were properly barred, since this inquiry would have jeopardized other ongoing investigations); *United States v. Varella*, 692 F.2d 1352, 1355 (11th Cir. 1982) (trial judge properly barred defense's cross-examination from inquiring into informants' names, occupations, home and business addresses, and the names of cases in which they had previously testified, where such information would endanger the physical safety of the informants and their families).

³¹⁹*Smith v. Maryland*, 390 U.S. 129 (1968).

³²⁰*United States v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977) (great latitude should be granted into cross-examining professional informant for bias); *Harris v. United States*, 371 F.2d 365, 366-67 (inquiry should be allowed into how much informant paid).

³²¹*Jencks Act*, 18 U.S.C. § 3500 (1982); Fed. R. Crim. P. 16(b).

³²²*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). These factors remain relevant under the "totality-of-the-circumstances" test to determine the validity of a search warrant announced in *Illinois v. Gates*, 462 U.S. 213 (1983).

³²³*State v. Iverson*, 364, N.W.2d 518, 523-24 (S.D., 1985) (probable cause for search of defendant's residence was provided by unnamed confidential informant who turned over marijuana and tape recording of drug transaction with defendant); *State v. Walker*, 688 P.2d 1213, 1217 (Idaho App. 1984) (Burnett, J.,

have to be produced on a suppression motion and the informant's identity can be protected from both the judge and the defense.

Likewise, the defense will be at a loss to show how the disclosure and production of the informant will be relevant or helpful to the defense's case on the merits. The issues of the credibility of the informant, the identity of the defendant, and entrapment will be completely eliminated through the use of a tape recorded drug transaction. No doubt, this evidence will lead to increased guilty pleas in drug cases. It also will relieve the Government of the unseemly role of having to vouch for a "dirty" informant. These advantages, in turn, will further aid the government's efforts to recruit informants.

The Government and the Supreme Court recognized these advantages in 1952 in *On Lee v. United States*.³²⁴ As previously discussed, this case involved On Lee's incriminating conversations concerning opium sales with the dirty informant, Chin Poy, who wore a concealed body microphone which transmitted the conversations to government agents. Although Chin Poy did not testify at trial, the conviction was sustained based on the testimony of the government agents. Justice Jackson, writing for the Court, commented on this trial tactic:

The normal manner of proof would be to call Chin Poy and have him reiterate the conversation. We can only speculate on the reasons why Chin Poy was not called. It seems a not unlikely assumption that the very defects of character and blemishes of record which made On Lee trust him with confidences would make a jury distrust his testimony. Chin Poy was close enough to the underworld to serve as bait, near enough the criminal design so that petitioner [On Lee] would embrace him as a confidante, but too close to it for the Government to vouch for him as a witness. Instead the Government called agent Lee. We should think a jury probably would find the testimony of agent Lee to have more probative value than the word of Chin Poy.³²⁵

This issue came before the Supreme Court again in *Lopez v. United States*,³²⁶ where an IRS agent taped the defendant's

concurring specially) (probable cause for search of defendant's residence was based on agent's electronic monitoring of informant's conversation with defendant about marijuana purchase).

³²⁴343 U.S. 747 (1952).

³²⁵*Id.* at 756.

³²⁶373 U.S. 427 (1963).

attempted bribes. The Court upheld the tape recording and its use as evidence at trial. In a concurring opinion, Chief Justice Warren asserted, that, without the recording, the trial would be the agent's word against the word of the tax evader.³²⁷ The agent's reputation for truthfulness would be injured and he would have no way to refute the defendant's denials or claims of entrapment.³²⁸ Chief Justice Warren, however, would not allow recordings to be used as a trial tactic to obviate the government's necessity to call a dirty informant as a witness, such as was the case in *On Lee*. Instead, he would have permitted recordings only to corroborate a testifying witness.³²⁹

The issue surrounding the use of this trial tactic was resolved in *United States v. White*,³³⁰ when the dirty informant, who had consented to the transmitting of defendant's narcotics deals, could not be located for trial. Instead, the agents who listened to defendant's narcotics deals testified, and defendant's conviction was upheld. Justice White pointed out the advantages of electronic surveillance to the Government and the informant:

An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory. . . . It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony.³³¹

In this case, there was no defense evidence that the Government had connived with the informant to thwart his location and production at trial.

Since these decisions, the use of informants and electronic surveillance in drug cases, even without the production of the informant, has become more common in civilian courts. The requirements for the admissibility of the tape recording have become less stringent. A strict chain of custody is not needed, but one should be maintained to rebut potential challenges of tampering.³³² The authentication of the recording does not require the

³²⁷*Id.* at 442 (Warren, C.J., concurring).

³²⁸*Id.*

³²⁹*Id.* at 446 n.3.

³³⁰401 U.S. 745 (1971).

³³¹*Id.* at 753.

³³²*See generally* *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974) (case contains a checklist of elements that are more than sufficient to lay a proper foundation for the admissibility of tape recording of conversation between

informant's testimony. Moreover, the right against self-incrimination is not violated by compelling the accused, even in open court, to provide voice exemplars for purposes of identifying him or her as a party to the conversation.³³³ The recording's admission without the informant does not violate the hearsay evidence rule or the confrontation clause, because it is the accused's words that are relevant and being introduced as admissions, and not the words of the informant.³³⁴ The requisite validity and voluntariness of the informant's consent can be demonstrated solely through the testimony of the government agent who obtained the **consent**.³³⁵

Inaudible portions in the tape recording do not render the whole recording inadmissible.³³⁶ Even if the whole recording is completely inaudible, the informant who was a party to the conversation may still testify as to what was said.³³⁷ Consequently, the government has nothing to lose, and much to gain, by wiring an informant and attempting to record the drug transaction.

IV. CONCLUSION

This article has attempted to demonstrate that the secretive and victimless nature of drug offenses require criminal investigators to resort to the use of informants, deception, and electronic surveillance to penetrate drug distribution networks. Drug investigators also need technological aids and sophisticated listening devices to determine the full extent of drug conspiracies, as well as to corroborate and protect informants.

Although many drug dealers in the Army appear to be relatively small-scale operators, the magnitude of their dealings will never be fully known without the use of informants, and in appropriate cases, the use of nonconsensual wiretaps and bugs. Despite the administrative burdens of nonconsensual surveillance, the courts are becoming increasingly receptive to their use in large-scale **drug** investigations.

informant and **drug** dealer); J. Carr, *supra* note 44, §§ 7.05[1], [2].

³³³*United States v. Akgun*, 19 M.J. 770 (A.C.M.R. 1984), *pet. granted*, 20 M.J. 379 (C.M.A. 1985); *United States v. Chandler*, 17 M.J. 678 (A.C.M.R. 1983); *State v. Morton*, 684 S.W.2d 601 (Mo. Ct. App. 1985).

³³⁴J. Carr, *supra* note 44, § 3.05[4][a][i], at 96-97; *see also* *United States v. Chiavola*, 744 F.2d 1271, 1275-76 (7th Cir. 1984).

³³⁵J. Carr, *supra* note 44, § 3.05[4][a][i], at 96-97.

³³⁶*McMillan*, 508 F.2d 101; *Morton*, 684 S.W.2d 601; *State v. Dunavant*, 674 S.W.2d 685 (Mo. Ct. App. 1984).

³³⁷J. Carr, *supra* note 44, § 7.05[4], at 450.

To further combat drug abuse, the Army should repeal its regulatory prohibitions against supplying drugs to suspected drug dealers. The use of “reverse sting” operations in drug cases is fully accepted by the courts as a necessary weapon to combat drug distributors.

The Army should make more effective use of informants in penetrating drug rings. First, a regulation should be promulgated requiring **all** soldiers to report the known drug abuse of others. Second, informants should be fully utilized in “reverse sting” operations, even to the extent of supplying drugs to ongoing suspected drug dealers. Third, greater effort should be made to protect informants. The best way to protect informants is by equipping them with concealed transmitting or recording devices. In this manner, the Government may not need to produce the informant for trial. This greater protection should result in more informants being willing to cooperate with the Government.

Unquestionably, the above recommended use of informants and electronic surveillance will require upgrading and increased training for CID agents and Army prosecutors. It will also be expensive. The average cost in the United States for conducting a nonconsensual electronic surveillance in 1985 was **\$36,493**.³³⁸ Nevertheless, greater use of informants and electronic surveillance will attack the supply side of the drug problem.

Beyond the consideration of cost, however, the Army has **an** almost moral obligation to attack the supply side of the drug problem as vigorously as it has attacked the demand side through the use of compulsory urinalysis. Society has always believed that the purveyor of illicit drugs is more culpable than the **user**.³³⁹ Moreover, the use of electronic surveillance and informants should infringe on the rights of only those reasonably suspected of dealing in drugs, whereas compulsory urinalysis inspections intrude upon every soldier’s privacy. Finally, the vigorous use of informants and electronic surveillance, in conjunction with the continued use of military inspections and compulsory urinalysis, provides the most promise of achieving the Army’s goal of the total elimination of drug abuse.

³³⁸Administrative Office’s Report on Applications for Orders, *supra* note 100, at 5.

³³⁹Greater maximum punishments are provided for drug dealers in the military than for users. MCM, 1984, Part IV, para. 37e.

INTERNATIONAL LEGAL IMPLICATIONS OF THE STRATEGIC DEFENSE INITIATIVE

by Major John E. Parkerson, Jr.*

I. AN INTRODUCTION TO THE STRATEGIC DEFENSE INITIATIVE

In a televised speech on March 23, 1983, President Reagan introduced a new element into the "strategic calculus" that for many years based the defense of the United States, and the deterrence of nuclear war, on the strategy of Mutual Assured Destruction (MAD).¹ The new element is **known** officially as the Strategic Defense Initiative (SDI). Detractors labelled the proposal "Star Wars." The President called the proposal a "vision of the future which offers hope"—a proposal to use defensive measures to counter the Soviet Union's strategic nuclear missile threat.² Accordingly, the President stated: "I **am** directing a comprehensive and intensive effort to define a long-term research and development program to begin to achieve our ultimate goal of eliminating the threat posed by strategic nuclear missiles."³ Significantly, the President stated that his proposal was consistent with US. obligations under the Anti-Ballistic Missile (ABM) Treaty;⁴ no other treaties were mentioned.

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¹*President's Speech on Military Spending and a New Defense*, N.Y. Times, March 24, 1983, at 20, col. 1 [hereinafter *President's Speech*].

²*Id.*

³*Id.*

⁴Treaty with the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503 (effective Oct. 3, 1972) [hereinafter ABM Treaty].

SDI presents many complex international legal issues that cannot, and will not, be resolved by a simple application of principles of treaty interpretation. SDI's impact on international agreements, political-strategic arms control processes, and global ordering mechanisms cannot be considered apart from each other; they are interrelated concepts. This article will show the interrelationship between policy and law in this area, thereby permitting discussion of SDI in several areas that previously have not been developed. Domestic statutory constraints generally are not discussed.

A. STRATEGIC CONCEPTS

Mutual Assured Destruction (MAD) in one form or another has formed the basis for the United States' strategic nuclear strategy for the past twenty years or so. Under MAD, both superpowers theoretically deter each other from launching a first strike by assuring that sufficient numbers of the attacked country's strategic missile forces will survive an attack so that it can retaliate massively against the attacker's homeland. This theory, to work, would require the U.S. and the **USSR** to remain undefended, so that each side would know that if it launched a missile attack against the other, the attacked force would be able to destroy its homeland in reprisal.⁵ This idea provides the strategic "stability" that exists between the two superpowers.

American leaders were not happy with a strategy based on a commitment to "mutual vulnerability" and the fear of mutual annihilation; but, in view of the nuclear stalemate, it generally was accepted as the only practical solution. Still, policymakers wished for an escape from the strategy. Dr. Henry Kissinger's remarks in Brussels in 1979 were typical of the feelings of many: "It cannot have occurred often in history that it was considered an advantageous military doctrine to make your country deliberately vulnerable . . . , Now we have reached the situation so devotedly worked for by the arms control community; we are indeed vulnerable."⁶ Kissinger went on to criticize the MAD doctrine on two grounds: "[T]he Soviets do not believe it, and . . . we have not yet bred a race of supermen that can

⁵Bureau of Public Affairs, U.S. Dep't of State, Special Rep. No. 129, *The Strategic Defense Initiative 1* (1985) [hereinafter *Special Report*]; Harvard Nuclear Study Group, *Living with Nuclear Weapons* 89, 91 (1983).

⁶Dr. Kissinger's remarks were made at a conference in Brussels sponsored by the Center for Strategic and International Studies, Georgetown University, under the theme: "NATO . . . The Next Thirty Years," quoted in Thillaye, *No Fantasy in US Strategic Defense Initiative*, Pac. Def. Rep. 79 (Dec. 1984/Jan. 1985).

implement it . . . It is absurd to base the strategy of the West on the credibility of mutual suicide.””

By the early 1980's, several trends suggested that continued long-term dependence on offensive forces no longer provided a stable basis for deterrence. The chief threat to United States dependence on MAD was the Soviet Union's improvement of its ballistic missile force.⁸ By 1980, the USSR possessed a force that, in a surprise attack, could eliminate a large part of the U.S. missile force and the leadership structure that commands it, thereby critically threatening American power to retaliate.⁹ United States officials saw this as proof that Soviet leaders had abandoned MAD, if indeed they ever had accepted it, and that they were determined to acquire a missile force that could destroy the military power of the United States in a first strike.¹⁰

General John W. Vessey, Jr., former Chairman of the Joint Chiefs of Staff, stated that the Soviet Union can now destroy 70 to 75 percent of our Minuteman missiles in a surprise attack.¹¹ Recent improvements in the accuracy of Soviet warheads have left the land-based leg of the U.S. strategic triad¹² in such a state of vulnerability that American Minuteman silos can be destroyed by a missile landing at a distance of **250** yards, even if they have been “hardened” by tons of concrete and steel.¹³ These Soviet improvements become even more ominous when one considers the missiles' potential for destroying not only U.S. missiles, but also American launch-control centers and the communications links that would relay the President's orders concerning when and how to execute a counterattack.¹⁴ The U.S. air-based leg of the strategic triad is even more vulnerable, and the submarine-based leg, standing alone, is regarded as ineffective to attack “hardened” land-based **targets**.¹⁵ One thing is clear: the capabilities of

⁷*Id.*

⁸Special Report, *supra* note 5, at 2.

⁹R. Jastrow, *How to Make Nuclear Weapons Obsolete* 18 (1985). Jastrow is the founder of NASA's Institute for Space Studies and Professor of Earth Sciences at Dartmouth College; he is a prime supporter of SDI within the scientific community.

¹⁰*Id.* at 20.

¹¹*Id.*

¹²The “strategic triad” consists of the land-based leg, primarily strategic missiles; the air-based leg, primarily ancient **B-52s** and air-launched cruise missiles; and the sea-based leg, primarily submarine-launched ballistic missiles (SLBMs).

¹³R. Jastrow, *supra* note 9, at 20.

¹⁴*Id.* at 21.

¹⁵*Id.* at 21-25. Those holding this view state that, although the survivability of the Trident submarine makes it an excellent deterrent to a Soviet attack, a missile launched from a submarine is relatively inaccurate: while it has the ability to

the Soviet ballistic missile force are far beyond any level needed to maintain a deterrent against a U.S. strategic missile attack. Simultaneously, the **USSR** is supplementing its offensive missile improvements with extensive development of "active" defenses, to counter U.S. retaliatory forces; and "passive" defenses, to assure survival of a greater portion of the Soviet population.¹⁶ These frightening developments indicate a movement away from any thoughts that actually fighting a nuclear war is "unthinkable."

President Reagan, faced with this threat, determined that continued long-term dependence on offensive forces, as predicated by MAD, no longer provided a stable basis for deterrence. The options for a U.S. response to the threat had become extremely dangerous, reduced essentially to a "launch on warning" policy.¹⁷ SDI appeared as a strategic response to the paradox. President Reagan envisioned the contemplated defense as a kind of shield between the U.S. and its enemies to protect against nuclear weapons—a defensive system that could intercept and destroy attacking ballistic missiles in mid-flight.¹⁸

In April 1983, the President ordered two intensive studies, to explore concepts and technologies that hold potential for a reliable ballistic missile defense, and to examine policy strategies related to those technologies.¹⁹ The Defensive Technology Study Team, headed by former NASA Administrator Dr. James Fletcher, submitted its report to the Department of Defense in October 1983.²⁰ In March 1984, Secretary of Defense Caspar W. Weinberger announced the establishment of the SDI program. Air Force Lieutenant General James Abrahamson, then Associate Administrator for the Space Transportation System of NASA,

destroy cities, it is not likely to land close enough to destroy a "hardened" or protected target. Carrying the strategic "wargaming" one step further, if the USSR launched an attack against U.S. military sites while avoiding its cities, the U.S. would be deterred from launching its submarine missiles against Soviet cities in reprisal, since the USSR could be certain to respond by attacking U.S. cities with its huge arsenal. An additional drawback of the Trident is its limited ability, when submerged, to communicate with its command and control sources. *See generally id.* at 23-27; Harvard Nuclear Study Group, *supra* note 5, at 174-76.

¹⁶Special report, *supra* note 5, at 2.

¹⁷Launch on warning is a policy of desperation, since it is a "hair-trigger" response to the fear that no retaliatory force will remain after a hostile first-strike. *See generally* Harvard Nuclear Study Group, *supra* note 5, at 172, 176-77; R. Jastrow, *supra* note 9, at 38.

¹⁸*President's Speech, supra* note 1.

¹⁹Abrahamson, *The Strategic Defense Initiative*, Army R, D & A 19 (Jan.-Feb. 1985); Yonas & Bethe, *Can Star Wars Make Us Safe?*, Sci. Dig. 31-32 (September 1985).

²⁰Abrahamson, *supra* note 19, at 19; Yonas & Bethe, *supra* note 19, at 32.

was named to manage the **program**.²¹ The Strategic Defense Initiative Organization was created to develop and implement a research program for ballistic missile defense, which would incorporate current defensive technologies with the new ones proposed in the study report.²²

B. OVERVIEW OF THE STRATEGIC DEFENSE INITIATIVE

The SDI program is a long-term effort in four phases. The first phase, lasting until the early 1990s, will consist of "research." At that time, decisions could be made on whether to begin engineering development of specific weapons. Assuming a decision to proceed, the second phase will focus on systems development—designing, building, and testing prototypes of actual defense components. The third phase will be a transition period, with incremental deployment of defenses, presumably by both the U.S. and the USSR. At this stage, the two countries could negotiate significant reductions in offensive missile forces. Finally, the fourth stage will be reached when defense deployments are completed or offensive missile forces reach their negotiated low point.²³

Perfect defense was not deemed necessary. Instead, three ultimate goals emerged from the SDI studies. First, the program seeks to identify options that will be sufficiently effective and affordable to eliminate the military utility of a nuclear first-strike, and thereby enhance crisis stability. Under this concept, U.S. defenses need only be sufficient to guarantee the survival of most U.S. retaliatory forces—key missile silos, Trident submarine pens, **air** bases, and command and communications. In this manner, the Soviets will be unsure of the extent of the nuclear retaliation they will face if they launch a first strike.²⁴ Second, the program seeks

²¹Abrahamson, *supra* note 19, at 19; Yonas & Bethe, *supra* note 19, at 32.

²²Yonas & Bethe, *supra* note 19, at 32.

²³*Id.*

²⁴Thillaye, *supra* note 6, at 80. Professor William Baugh, a physicist and political scientist, has explained it thus: "The intent in building such a defense is not to achieve perfection in the form of zero enemy penetration, but to reduce enemy penetration to the point that any attack is deterred by uncertainty about its effects." W. Baugh, *The Politics of Nuclear Balance*, *quoted in* J. Pournelle & D. Ing, *Mutual Assured Survival* 34 (1984). *See generally* R. Jastrow, *supra* note 9, at 15-16; J. Pournelle & D. Ing, *supra*, at 97-98; Yonas & Bethe, *supra* note 19, at 32. The State Department **also** has stated the principle from a different angle: "We would deter a potential aggressor by making it clear that we could deny him the gains he might otherwise hope to achieve rather than merely threatening him with costs large enough to outweigh those gains." Special Report, *supra* note 5, at 5.

to create a situation where, in the unlikely event nuclear weapons were used in spite of ballistic missile defenses, damage to lives and property to some extent may be limited.²⁵ Third, SDI seeks to create both military and economic incentives for negotiating offensive force reductions by reducing the value of offensive ballistic missile **forces**.²⁶ Administration officials also hope that a ballistic missile defense could provide some security against any "remarkably ill-disciplined" third world country that may obtain a nuclear explosive device in the future.²⁷

The U.S. Administration focuses on the initial phase of SDI and, therefore, views it as a "research" program with a purpose of exploring technologies so that future U.S. Administrations will have technical options on whether to develop and deploy strategic defense systems.²⁸ The Soviet Union, on the other hand, views the SDI program as a whole and sees a US. threat that begs a Soviet response. Predictably, Soviet comments have been negative. Then-President Yuri Andropov, responding to President Reagan's SDI proposal, summarized the Soviet position:

On the face of it, laymen may find it even attractive as the President speaks about what seem to be defensive measures In fact the strategic offensive forces of the United States **will** continue to be developed and upgraded at full tilt, and along a quite definite line at that, namely that of acquiring a first nuclear strike capability. Under these conditions the intention to secure itself the possibility of destroying with the help of antiballistic missile defenses the corresponding strategic systems of the other side, that is of rendering it unable to deal a retaliatory strike, is a bid to disarm the Soviet Union in the face of the US. nuclear **threat**.²⁹

²⁵Thillaye, *supra* note 6, at 80.

²⁶*Id.*

²⁷George A. Keyworth II, Science Advisor to the President, *quoted in* Thillaye, *supra* note 6, at 80.

²⁸U.S. Dep't of Defense, *Soviet Military Power*, 1985, at 136; Special Report, *supra* note 5, at 4.

²⁹President Yuri Andropov, *quoted in* Bundy, Kennan, McNamara & Smith, *The President's Choice: Star Wars or Arms Control*, 63 Foreign Affairs 271 (1984-85). Marshal Sergei Akhromeyev, Soviet Chief of General Staff, stated that "the essence of the American Star Wars program boils down to the treacherous aim of giving the United States the potential to make a first nuclear strike at the Soviet Union with impunity and deprive it, by creating a national antimissile defense, of the opportunity to make a retaliatory strike." Wash. Post, Oct. 25, 1985, at 24, col. 1.

The Soviet Union, because of its distrust of **U.S.** intentions, thus views SDI as part of a developing American first-strike capability that creates, rather than remedies, strategic instability. The corollary to this viewpoint has been stated by Marshal Sergei Akhromeyev, chief of the Soviet general staff namely, that the **USSR** must react to SDI by expanding its own ballistic missile defense program and by deploying increased numbers of offensive missiles so that the **USSR** will be able to saturate and thereby overwhelm American defenses.³⁰ Whether SDI will have the actual effect on Soviet policy enunciated by the Kremlin, or the effect, desired by **U.S.** decisionmakers, of encouraging ballistic missile reductions, remains to be seen.

C. TECHNOLOGY ASSESSMENT

A brief summary of the technological development is necessary in order to assess the legality of the proposed systems and to understand the impact of ballistic missile defense technology upon MAD. The United States began formal efforts to develop a missile defense system in 1956 with the Army's Nike-Zeus.³¹ The system used four radars to track an incoming missile and guide the intercepting missile. It actually intercepted a missile during a demonstration in 1962, but was never deployed.³² A more advanced system, the Nike X, subsequently was researched but never deployed. In 1967, President Johnson instead ordered deployment of the "Sentinel" system for area defense of the **U.S.** against small missile attacks such as might be within China's capability.³³

Sentinel never was deployed, and in 1969 President Nixon announced the decision to replace Sentinel with a system called "Safeguard." Safeguard was the first American anti-ballistic missile (ABM) system ever actually built, and it had its problems.³⁴ The system used basically the same components as Sentinel. It was land-based and consisted of radars, launchers,

³⁰Wash. Post, Oct. 19, 1985, at 14, col. 3.

³¹N. Polmar, *Strategic Weapons: An Introduction* 60 (1975). As early as the 1940s, atomic bomb pioneer J. Robert Oppenheimer urged the world to work on a defense against his creation, arguing it was a moral as well as strategic imperative. *Christian Science Monitor*, Nov. 4, 1985, at 29, col. 4.

³²ABM: An Evaluation of the Decision to Deploy an Antiballistic Missile System 3 (A. Chayes & J. Wiesner ed. 1969) [hereinafter Chayes & Wiesner].

³³*Id.* at 4; N. Polmar, *supra* note 31, at 60; Smoke, *The Evolution of American Defense Policy*, in *American Defense Policy* 121 (J. Reichart & S. Sturm ed. 1982). Wee generally S. Huntington, *The Strategic Imperative: New Policies for American Security* 152-53, 156-57 (1982); Chayes & Wiesner, *supra* note 32, at 4.

and two types of interceptors with nuclear warheads.³⁵ But, unlike Sentinel, which was intended to provide point defense of American cities, Safeguard was intended to provide point defense for Minuteman silos. Partially for this reason, public support never rallied, since defense only of silos was viewed as a rather modest effort. Also, serious flaws in the system made it possible for an innovative attacker to defeat Safeguard at a reasonably low cost.³⁶ The planned use of nuclear warheads further contributed to the lack of support for the system.³⁷ Add to these factors the general pressure on Capitol Hill to reduce military spending in 1969 and 1970, and one can see why Safeguard barely passed through Congress.³⁸

Soviet ballistic missile defense efforts probably began shortly after Nike-Zeus. In 1964, the Soviets displayed an anti-ballistic missile which NATO labeled the Galosh. Galosh missile launchers and associated radars subsequently were deployed around Moscow. Within three or four years, the system consisted of large associated radars and 64 interceptor missiles, with one or two megaton nuclear warheads and an estimated range of 200 miles.³⁹ Ballistic missile defense development, therefore, was not historically an exclusive U.S. monopoly.

During this period, the issue of whether to deploy a missile defense system was vigorously debated.⁴⁰ There were five classes of anti-ballistic missile defense arguments advanced, most of which essentially are the same heard today: the system would not work; whether or not it would work, it was not needed; it would destroy the stability of deterrence; it would mean a threat to particular localities that it defended; and it was a project encouraged by, and for the benefit of, the military industrial

³⁵S. Huntington, *supra* note 34, at 152-53, 156-57. The two missiles were the Spartan, designed to intercept in outer space; and the Sprint, designed to intercept warheads near the ground. Chayes & Wiesner, *supra* note 32, at 7; Smith, *Legal Implications of a Space-Based Ballistic Missile Defense*, 15 Cal. W. Int'l L.J. 52, 54 (1985).

³⁶S. Huntington, *supra* note 34, at 152, 157.

³⁷Safeguard could not be tested in an operational mode because the 1963 Limited Test Ban Treaty banned nuclear tests in the atmosphere and in outer space and because, if ever used, the nuclear explosions in the atmosphere could cause casualties on the ground and disrupt radars, computers and communications required to operate the system. Smith, *supra* note 35, at 54; *see infra* text accompanying notes 346-54.

³⁸S. Huntington, *supra* note 34, at 153.

³⁹N. Polmar, *supra* note 31, at 60.

⁴⁰Gray, *A New Debate on Ballistic Missile Defense*, in American Defense Policy, *supra* note 33, at 480.

complex.⁴¹ These arguments prevailed and the ABM treaty, which was supposed to impose the status quo of MAD by prohibiting the proliferation of missile defenses, was signed in 1972 at the peak of detente.⁴²

As discussed earlier, subsequent changes in Soviet offensive and defensive capabilities invalidated much of the anti-ballistic missile defense argument.⁴³ Also, President Reagan is not today hampered by the anti-military industrial complex arguments of the Vietnam era; he has been largely successful in arguing for Congressional approval of exotic defense programs.⁴⁴ But most important, recent advances in ground-based and space-based component technology have led many people to believe that a defense to the enhanced Soviet threat is now feasible. For the first time, many thought it was feasible to add outer space as a base for providing "depth" to a missile defense system.⁴⁵

⁴¹*Id.* at 481-82. It allegedly would promote arms-race instability by causing the USSR to invest in greater quantities of offensive ballistic missiles to overcome the defensive system; and it would promote crisis-instability because the country having an effective ballistic missile defense could launch a first-strike with impunity, free from fear of nuclear retaliation. *See generally Strategic and Foreign Policy Implications of ABM Systems: Hearings Before the Senate Comm. on Foreign Relations, Subcomm. on International Organization and Disarmament Affairs*, 91st Cong., 1st Sess. (1969); Chayes & Wiesner, *supra* note 32, at 8.

⁴²ABM Treaty, *supra* note 4.

⁴³*See supra* text accompanying notes 8-10.

⁴⁴The so-called "military-industrial complex", and academia as well, stand to make huge profits from SDI. Some experts estimate that building the envisioned defensive shield could ultimately cost anywhere from \$400 billion to \$1.2 trillion. While these estimates are speculative, SDI realistically could become the biggest bonanza ever for American businesses and universities. Estimated funding requirements for SDI during its initial "research" phase, fiscal years 1985 through 1989, are approximately \$26 billion. Cost will be a critical factor, particularly considering efforts to trim the federal deficit. But Congress nonetheless approved \$1.4 billion for fiscal year 1985 and \$2.75 billion for fiscal year 1986—behind SDI schedules but still well on track. Abrahamson, *supra* note 19, at 20; *The Star Wars Sweepstakes*, Time, Oct. 7, 1985, at 48; *What's Next for Star Wars*, Newsweek, Dec. 2, 1985, at 45. But there is growing evidence of congressional backlash against continued SDI spending at these levels. *See* Wash. Post, June 20, 1986, at A1, col. 1; Wash. Post, June 14, 1986, at A10, col. 4; Wash. Post, May 28, 1986, at A4, col. 1; Wash. Post, May 23, 1986, at A1, col. 5. Congress appropriated \$3.2 billion for SDI for FY 87—far from the \$5.3 billion sought by President Reagan, but still the largest single funding request in the defense budget. Wash. Post, Oct. 18, 1986, at A1. *See* N.Y. Times, Aug. 13, 1986, at A1, col. 1. President Reagan is seeking \$5.79 billion for FY 88. Wash. Post, Jan. 5, 1987, at A6, col. 4.

⁴⁵In the civilian sector, the most effective movement to push initially for utilization of outer space for ballistic missile defense was a nonprofit, conservative organization called High Frontier, led by retired Air Force General Daniel Graham, who at one time had been a military advisor to presidential candidate Reagan, and the Deputy Director of the CIA. D. Graham, High Frontier: A Strategy for National Survival (1983). Another influential group promoting a ballistic missile defense with a substantial spacebased element is the L-5 Society Promoting Space Development. Its Citizens Advisory Counsel on National Space Policy presented

Currently there are five principle technologies under consideration as defensive weapons components of SDI: pulsed laser, continuous wave laser, continuous particle beam, mass accelerator, and self-propelled missile.⁴⁶ In addition to a "kill mechanism," many other technologies are required for a spaced-based defensive weapon system: land and space-based precision sensors, involving complex computer and software technologies, for surveillance, target acquisition and discrimination, tracking and pointing; complex electronics systems; and immense power supplies.⁴⁷

Many of the weapons proposed for SDI, such as the self-propelled missile and hyper-velocity gun systems,⁴⁸ are "grand-children" of earlier ground-based ballistic missile defense proposals. Others, such as the x-ray laser, excimer laser, free electron laser, chemical laser, and neutron particle beam, are exotic devices that commonly are closely associated with "Star Wars."⁴⁹ Except

an extensive report to President Reagan supporting SDI following the President's March 23, 1983 speech. The report became the basis for the book by J. Pournelle & D. Ing., *supra* note 24.

⁴⁶Smith, *supra* note 35, at 55 & n.18. The pulsed laser delivers a high impulse shock that causes structural collapse of the missile booster. The continuous wave laser bums a hole in its target. The continuous particle beam destroys internal missile components. The mass accelerator accelerates small homing hit-to-kill vehicles; an example is the kinetic energy rail gun. The self-propelled missile homes in and destroys the ballistic missile with a hit-to-kill vehicle.

⁴⁷*Id.*; Abrahamson, *supra* note 19, at 20. See generally R. Jastrow, *supra* note 9, for a detailed discussion of SDI technologies. The literature points to computer technology as perhaps the most critical problem of SDI.

⁴⁸Hyper-velocity gun systems are mass accelerator technology weapons such as the kinetic energy rail gun. An extremely intense magnetic field created by several million amperes of electrical current propels a "smart rock," mounted on a sliding carriage between two rails, forward at speeds far greater than any combustion type of acceleration. The collision with the attacking missile causes the target to disintegrate. R. Jastrow, *supra* note 9, at 91-93. General Graham and others have noted that the United States already has at least one fully-developed weapon, the GAU-8 gun, a 30mm. cannon that quickly and cheaply could be adapted to ballistic missile defense from its original role as the chief armament of the A-10 attack aircraft. D. Graham, *supra* note 45, at 270; J. Pournelle & D. Ing. *supra* note 24, at 43-44.

⁴⁹See generally R. Jastrow, *supra* note 9, at 83-99. The laser beam weapons generally destroy their target either by delivering a high impulse shock causing structural collapse of the booster or by staying on the target until a hole is burned through. Particle beam weapons are supposed to destroy the internal components of the attacking weapon, rendering them harmless. A chief problem with laser beam weapons is that the atmosphere dissipates beams originating from earth. Therefore, special optics have to be developed and placed into space to focus the beam from earth into a beam strong enough to aim against attacking missiles; or a method of placing the laser gun itself into space must be developed. Lieutenant General Abrahamson has often described the "free-electron laser" being developed by Lawrence Livermore National Laboratory in California as the most promising SDI technology. Construction of this experimental laser is expected to begin in 1987 at White Sands, New Mexico. It also will have an antisatellite capability. Wash. Post, Apr. 18, 1986, at A4, col. 1. An excellent summary of exotic "Star

for the nuclear powered x-ray **laser**,⁵⁰ nuclear technologies are no longer regarded as necessary for an effective defense.

SDI envisions a "layered" defense, with different types of systems that would operate against attacking missiles at many places during their thirty-minute trajectory. The typical Soviet multiple-warhead ballistic missile⁵¹ has four flight phases: (1) boost phase, in which first- and second-stage rocket engines of the missile are burning, producing an intense infrared "signature;" (2) post-boost phase, in which the "bus" (warhead carrier) separates from the rocket engines, and then deploys multiple warheads, along with penetration aids such as decoys and chaff; (3) mid-course phase, in which multiple warheads and penetration aids travel on ballistic trajectories through space; and (4) terminal phase, in which warheads and penetration aids reenter earth's atmosphere. SDI seeks to explore technologies that will allow the engagement of attacking missiles during all these phases.⁵² SDI terminal-phase defense will be composed chiefly of ground-based systems; while the exotic space-based technologies, and some ground-based systems, generally will counter attacking missiles during the first three phases of their flight.⁵³ The Army has already used a ground-based anti-ballistic missile to destroy a mock incoming missile. On June 10, 1984, in the Army's Homing Overlay Experiment, a kinetic energy interceptor launched from Kwajalein Atoll in the central Pacific tracked and intercepted a mock Minuteman I missile outside the atmosphere and destroyed it by striking it with its nonnuclear warhead at a velocity of 20,000 feet per second (about 13,600 **mph**).⁵⁴ Other experiments have shown that, with new optical techniques for offsetting atmospheric distortion, ground-based laser beams can be trained on targets in space for up to three minutes.⁵⁵ And recently,

WARS" technology is Heppenheimer, *Zapping Missiles in Space*, High Technology 72 (Aug. 1985).

The x-ray laser is also the most controversial of the new technologies, because it is powered by a small nuclear explosion that produces beams of very intense x-rays. The principle behind the weapon has been demonstrated in underground Nevada tests, but it remains a long way from being an operational weapon. *See generally* J. Pournelle & D. Ing, *supra* note 24, at 58-61.

"Commonly called MIRV—multiple independently-targeted reentry vehicles.

⁵²Abrahamson, *supra* note 19, at 20; U.S. Dep't of Defense, *supra* note 28, at 136. *See generally* J. Pournelle & D. Ing, *supra* note 24, at 41-44.

⁵³*See generally* R. Jastrow, *supra* note 9, at 100-20.

⁵⁴Abrahamson, *supra* note 19, at 21; Heppenheimer, *supra* note 49, at 74.

⁵⁵*What's Next for Star Wars*, Newsweek, Dec. 2, 1985, at 46.

General Abrahamson predicted that parts of SDI will be deployable sooner than expected.⁵⁶

The Soviet Union has proven that it does not intend to be left behind in the exotic technology race. According to General Abrahamson, the evidence of massive Soviet investments in programs dedicated to ballistic missile defense is "overwhelming . . . and rather frightening."⁵⁷ The Department of Defense reports that the Soviets also adhere to a layered defense concept based on multiple types of defensive capabilities.⁵⁸ The Soviet Union is deploying new tactical and anti-tactical surface-to-air (SAM) missiles that appear to have missile defense capabilities and is developing new radar components for area defense. The Soviets also are developing particle beam weapons and could have prototypes for ground-based lasers by the late 1980s.⁵⁹

That is a general overview of how far SDI strategic thinking and technological development have progressed. The concept is not new, and neither are many of the technologies under consideration. Technological and strategic constraints upon SDI aside, important legal constraints also exist.

11. LEGAL PROBLEMS WITH THE MILITARIZATION OF SPACE

SDI affects numerous international agreements. Most of the affected agreements, in one way or another, attempt to control arms that will pass through some part of outer space. The

⁵⁶*Id.* at 47. Robert Jastrow predicts that a 90-percent-effective limited defense could be in place by the early 1990s, using off-the-shelf technology. R. Jastrow, *supra* note 9, at 100-01. Secretary of Defense Caspar W. Weinberger urges that a decision be made soon for early deployment of parts of the defensive system. N.Y. Times, Feb. 7, 1987, at A1, col. 1; N.Y. Times, Feb. 9, 1987, at A1, col. 4; N.Y. Times, Feb. 11, 1987 at A1, col. 3.

⁵⁷Statement by Lieutenant General James A. Abrahamson, Director, Strategic Defense Initiative Organization, before the Sub-committee on Strategic and Theatre Nuclear Forces of the Committee on Armed Services, U.S. Congress, April 14, 1984, *quoted in* Thillaye, *supra* note 6, at 80.

⁵⁸U.S. Dep't of Defense, *supra* note 28, at 43.

⁵⁹*Id.* at 44-48. The Soviet Union will attempt to devise ways to counter a U.S. ballistic missile defense, such as by building more offensive missiles and warheads to saturate the defense; disguising the warheads in some manner; skirting the defense by using submarine-launched missiles close to U.S. shores, or using low-flying cruise missiles and strategic bombers; spinning boosters to prevent laser bums, thickening missile skins, or using fast-burn boosters; or orbiting "space mines" to destroy space-based SDI components, such as tracking satellites or laser optical components. SDI proponents hope these steps would be prohibitively expensive for the Soviets. Christian Science Monitor, Nov. 4, 1985 at 30, col. 1. See generally R. Jastrow, *supra* note 9, at 60-66; J. Pournelle & D. Ing, *supra* note 24, at 40.

pertinent agreements discussed in this paper are the Outer Space Treaty,⁶⁰ the Anti-Ballistic Missile (ABM) Treaty,⁶¹ SALT I,⁶² SALT II,⁶³ the Limited Test Ban Treaty,⁶⁴ and the Non-Proliferation Treaty.⁶⁵ International collective security agreements are noted only as they are affected by the technology transfer and strategic implications of SDI.

A. THE OUTER SPACE TREATY

The treaty most directly pertaining to the militarization of outer space is the Outer Space Treaty.⁶⁶ Signed in 1967 by the U.S., the Soviet Union, and over 100 other nations under United Nations sponsorship, the treaty, among other things,⁶⁷ sought to restrict military activities in outer space and to preserve its use for peaceful purposes. It was the culmination of a long series of United States General Assembly resolutions that urged limitations on the use of outer space for military purposes.⁶⁸ Articles I and II establish the principle of freedom of outer space.⁶⁹ Article III states that outer space should be used in accordance with

⁶⁰Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967) [hereinafter Outer Space Treaty].

⁶¹ABM Treaty, *supra* note 4.

⁶²Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms with Protocol, May 26, 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504 (effective Oct. 3, 1972) [hereinafter SALT I].

⁶³Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms with Protocol, June 18, 1979 (not ratified by U.S.) [hereinafter SALT II], reprinted in U.S. Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements 150 (1982).

⁶⁴Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, August 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (effective Oct. 10, 1963) [hereinafter Limited Test Ban Treaty].

⁶⁵Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (effective Mar. 5, 1970) [hereinafter Non-Proliferation Treaty].

⁶⁶Outer Space Treaty, *supra* note 60.

⁶⁷The treaty also includes provisions for the rescue and return of astronauts, liability for space activities, and registration of space objects. *Id.* arts. V-VIII.

⁶⁸The most important was a General Assembly resolution unanimously adopted on October 17, 1963, which called upon all States to refrain from introducing weapons of mass destruction into outer space. G.A. Res. 1884, 18 U.N. GAOR Supp. (No. 15) at 13, U.N. Doc. A15515 (1963). See generally U.S. Arms Control and Disarmament Agency, *supra* note 63, at 48-49.

⁶⁹Article I states: "The exploration and use of outer space . . . shall be carried out for the benefit and in the interests of all countries . . ." and "[o]uter space . . . shall be free for exploration and use by all States . . ." Article II states: "Outer space . . . is not subject to national appropriation . . ." Outer Space Treaty, *supra* note 60, arts. I-II.

international law, including the U.N. Charter, in the interest of maintaining international peace and security.⁷⁰ Customary international law, however, is not very helpful in defining these limits to military activities in space. Neither is the U.N. Charter. Article 1 of the Charter expresses as one of the United Nation's purposes the suppression of acts of aggression or other breaches of the peace; Article 2 requires that member states refrain from the threat or use of force in international relations; Article 51 recognizes the rights of States to engage in individual or collective self-defense. All are pertinent principles that are applicable to Article III of the Outer Space Treaty. But these provisions, except perhaps Article 51, which arguably would permit stationing of anticipatory defensive systems in outer space, are too broad to add much of any value to Article III of the Outer Space Treaty.⁷¹

Article IV is the key arms control provision of the Outer Space Treaty.⁷² Its two paragraphs cover two separate areas. The first paragraph covers "outer space" and prohibits the placing of nuclear weapons or other weapons of mass destruction in orbit or the stationing of such weapons in outer space. The paragraph is particularly relevant to SDI because space-based ballistic missile defense components would operate in "outer space." Paragraph two pertains to "the moon and other celestial bodies" and restricts their use "exclusively for peaceful purposes."⁷³

⁷⁰*Id.* art. 111.

⁷¹U.N. Charter arts. 1, 2, 51. Sune Danielson, Counsellor, Permanent Mission of Sweden to the U.N., implies that an attack by a military space system could be justified under "self-defense." Danielson, *Examination of Proposals Relating to the Prevention of an Arms Race in Outer Space*, 12 J. Space L. 1 (1984); see International Security Dimensions of Space 217 (U. Ra'anan & R. Pfaltzgraff, Jr. ed. 1984) [hereinafter U. Ra'anan & R. Pfaltzgraff, Jr.].

⁷²Article IV states:

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

Outer Space Treaty, *supra* note 60, art. IV.

⁷³*Id.*

Predictably, states and many commentators are attempting to define "outer space." This is relevant to military uses of space because provisions of the Outer Space Treaty may serve to bar certain military activities if they occur in "outer space," as opposed to activities within the upward territorial jurisdiction of the State. The Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) is wrestling with the issue of delimitation of outer space, trying to establish the boundary between a state's sovereign "air space" and the free "outer space."⁷⁴ There is an indication that states and commentators are leaning towards a boundary at 110 kilometers above sea level. The "Space Powers" have created a rule of general international law that satellites are considered to lie in outer space. As a result, national airspace cannot extend beyond the altitude of the orbit of the lowest satellites, which are approximately 100 to 110 kilometers above sea level. Conversely, outer space can be regarded as starting at this height or somewhere just below it.⁷⁵

The lack of any language in the first paragraph of Article IV to restrict activities in outer space to "peaceful purposes" caused much debate over the proper interpretation of the Outer Space Treaty. Historically, states generally agreed that activities in space should be confined to peaceful purposes. United States policy, stated in official statements and legislation since 1958, expressed that outer space should be devoted to peaceful purposes. President Eisenhower in 1958 declared to Congress, upon the founding of the National Aeronautical and Space Administration (NASA), "the concern of our nation that outer space be devoted to peaceful and scientific purposes."⁷⁶ The Aeronautics and Space Act of 1958 expressly provided that "it is the policy of the United States that activities in space shall be devoted to peaceful purposes for the benefit of all mankind."⁷⁷ It is indicative, however, that the Act further provided in the same section for the military departments to conduct space activities related to "the development of weapons systems, military operations, or the

"Kopal, *Evolution of the Main Principles of Space Law in the Institutional Framework of the United Nations*, 12 J. Space L. 12, 21 (1984). Kopal is Chief, Outer Space Affairs Division, United Nations.

"Id.; Cheng, *The Legal Status of Outer Space and Related Issues: Delimitation of Outer Space and Definition of Peaceful Use*, 11 J. Space L. 93-95 (Spring & Fall 1983). Cheng is Professor of Air and Space Law, University of London.

⁷⁶Statements by the President of the United States on International Cooperation in Space, in *Senate Committee on Aeronautics and Space Sciences*, Sept. 21, 1971, at 12, quoted in U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 217.

⁷⁷Aeronautics and Space Act, 42 U.S.C. § 2451(a) (1982).

defense of the United States.”⁷⁸ In this context, it is easy to see that the U.S. never intended “peaceful purposes” to exclude the use of outer space for military purposes. Rather, the U.S. position, which has gained general acceptance, came to define “peaceful” as meaning “nonaggressive.” This, in effect, permits all conduct, including military activity, except activities that are an aggressive use of outer space.⁷⁹ Senator Albert Gore, representing the United States before the U.N. General Assembly in 1962, emphasized the point that “the test of any space activities must not be whether it is military or nonmilitary, but whether or not it is consistent with the United Nations Charter and other obligations of law.”⁸⁰ In other words, the U.S. view is that “peaceful purposes” are not inconsistent with those provisions in the U.N. Charter and in customary international law that preserve the right of States to take armed action for their individual and collective self-defense.⁸¹

The U.S. view is buttressed by an examination of the U.N. General Assembly resolutions that preceded the Outer Space Treaty. Although the resolutions generally provide that outer space should be used exclusively for peaceful purposes, the term was not precisely defined.⁸² Instead, the review of the negotiating history leading to the Outer Space Treaty and of U.N. Resolution 1962 of December 13, 1963, which formed the basis for the treaty, reveals that a general prohibition on military weapons in space was not intended. Many delegations, such as the United Arab Republic delegation, urged inclusion of a principle that military activity be barred from outer space.⁸³ Primarily, these delegations represented states that had no outer space capability. But the Soviet Union was at least partially responsible for ensuring that such a provision was not included; it took the view that the

⁷⁸*Id.* § 2451(b) (1982).

⁷⁹*See generally* C. Christol, *The Modern International Law of Outer Space* 22-28 (1982); S. Lay & H. Taubenfeld, *The Law Relating to Activities of Man in Space* 97-102 (1970); Cheng, *supra* note 75, at 98-105; Menter, *Peaceful Uses of Outer Space and National Security*, 17 *Int'l Law.* 581 (1983). Much has been written on this subject.

⁸⁰*Quoted in* Cheng, *supra* note 75, at 99; C. Christol, *supra* note 79, at 29-30.

⁸¹U.N. Charter arts. 1, 2, 51; Danielson, *supra* note 71, at 1; Menter, *supra* note 79, at 585.

⁸²*See generally* Conclusion of an International Convention on the Reduction of Armaments and the Prohibition of Atomic, Hydrogen and Other Weapons of Mass Destruction, G.A. Res. 1148, 12 U.N. GAOR Supp. (No. 18) at 195, U.N. Doc. A13805 (1957), para. 1(f) (“the sending of objects through outer space shall be exclusively for peaceful and scientific purposes”); Question of the Peaceful Use of Outer Space, G.A. Res. 1348, 13 U.N. GAOR Supp. (No. 18) at 99, U.N. Doc. A14090 (1958) (“outer space should be used for peaceful purposes only . . .”).

⁸³U.N. Doc. A/C.1/PV 1342, Dec. 2, 1963, *cited in* Menter, *supra* note 79, at 583.

subject more appropriately should be considered in general disarmament proposals.⁸⁴

Another school of thought defines "peaceful" as meaning "nonmilitary." This interpretation focuses on the more general articles of the treaty and concludes that the general purpose of the treaty is to ensure that outer space is used only for peaceful purposes and for the benefit of all mankind to the exclusion of military purposes.⁸⁵ The argument focuses upon the preamble of the Outer Space Treaty, "[r]ecognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,"⁸⁶ and upon Articles IX, X and XI, which urge international cooperation in the peaceful exploration and use of outer space.⁸⁷ It also emphasizes Article I, which states: "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind."⁸⁸

The argument stresses that the phrase "for the benefit and in the interests of all countries" is, in effect, a substitute for the word "peaceful," and that it necessarily excludes all military uses of outer space. The phrase, the argument continues, is mutually exclusive with military activities in outer space, because the military capability of a state is not for the benefit of all countries, but rather for the benefit only of the country possessing it.⁸⁹ This, in effect, extends a "nonmilitary" definition of "peaceful purposes" to all articles of the Outer Space Treaty.

⁸⁴Ambassador Fedorenko, head of the USSR delegation, stated:

This draft resolution does not and could not, of course, deal with the matter of military use of Outer Space. As the members of the Committee all know, the Soviet Union has often stated that it is prepared, within the framework of a programme of general and complete disarmament under strict international controls, to destroy all types of weapons. That would also solve the problem of prohibiting the use of space for military purposes. However, . . . we do not agree with attempts to divorce the matter of military uses of outer space from other matters of disarmament which are intimately linked with it

Id.

⁸⁵Professor Marko C. Markoff is a primary advocate for this idea. See Markoff, *Disarmament and 'Peaceful Purposes' Provisions in the 1967 Outer Space Treaty*, 4 J. Space L. 3 (1976).

⁸⁶Outer Space Treaty, *supra* note 60, preamble.

⁸⁷*Id.* arts. IX, X, XI.

⁸⁸*Id.* art. I.

⁸⁹Markoff, *supra* note 85, at 11.

This second school of thought, which excludes all military activities in space, is wrought with problems. It conflicts with the specific language of Article IV that prohibits the placing in orbit of weapons of mass destruction.⁹⁰ Under accepted principles of treaty interpretation, what matters most is the intention of the parties as expressed in the text, giving the terms their "ordinary meaning." Only when the text is unclear is resort to other means of interpretation necessary.⁹¹ Article IV is unambiguous. In view of the clear expression of intent in the text of Article IV, the treaty's general articles, which do not specifically address military activities, cannot logically be interpreted by applying a rule of "ordinary meaning" to conclude that the treaty prohibits **all** military activities in space. As the counterpart to this logic, if "peaceful purposes" is interpreted to mean "nonmilitary," the specific language in Article IV would render the interpretation applicable only to the second paragraph of Article IV, which pertains to the "moon and other celestial bodies."

Further evidence indicates that Article IV was intended to be the only article pertaining to military activities and that general references to "peaceful purposes" were not intended to bar all military activities in space. A 1967 U.S. Senate Committee review of the "Negotiation of Treaty Provisions" noted a problem of translation between key terms in the Russian and English languages. It states: "In Russian, the word for 'military' essentially means warlike rather than pertaining to the armed services of a country; in the United States, 'peaceful' is not regarded **as** the opposite of 'military' — we think of 'peaceful' as 'nonaggressive.'"⁹² The language implies that both the United States and the Soviet Union agreed that "peaceful purposes" included employment in space of nonaggressive, or nonwarlike, military components.⁹³ The view is supported by the practice of the leading space powers. Both countries extensively use earth-orbiting military satellites for communications, surveillance, mapping, geodesy, and weather forecasting, and vehicles such as the U.S. space shuttle are used for military **transportation**.⁹⁴ **More-**

⁹⁰See *supra* note 72.

⁹¹Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, U.N. Doc. A/CONF. 39/27 [hereinafter Vienna Convention], art. 31, *reprinted in* Basic Documents in International Law 348-86 (I. Brownlie ed. 1983); I. Brownlie, Principles of Public International Law 624-30 (3d ed. 1979).

⁹²Staff of Senate Comm. on Aeronautical and Space Sciences, 90th Cong., 1st Sess., Report on "Analysis and Background Data" of the Outer Space Treaty 11 (1967), *quoted in* Menter, *supra* note 79, at 585.

⁹³Menter, *supra* note 79, at 585.

⁹⁴Smith, *supra* note 35, at 53-54.

over, the recent U.N. Convention on the Law of the Sea,⁹⁵ which provides that the high seas are reserved for "peaceful purposes," also supports this view. Since it makes no attempt to ban military vessels from the high seas, it implies that nonaggressive use of the high seas by military vessels is a peaceful use.⁹⁶

From this examination of the plain language of Article IV and giving it its "ordinary meaning," it is clear that "peaceful purposes" does not exclude SDI. "Peaceful purposes" is used specifically in only the second paragraph of Article IV, which states that the moon and celestial bodies must be used for "peaceful purposes." It makes no mention of objects that are to be placed in orbit around earth, such as those envisioned in SDI.⁹⁷ The first paragraph of Article IV, however, covers orbiting military space objects, and it makes no mention of "peaceful purposes."⁹⁸ Thus, "peaceful purposes," no matter how it is defined, is inapplicable to a plain reading of the first paragraph.⁹⁹ This seems particularly logical in view of Article III, which applies international law and the U.N. Charter, including its self-defense provisions, to the Outer Space Treaty as a whole and thereby assures that any use of space must be nonaggressive.¹⁰⁰ The negotiating history also supports the view that the "peaceful purposes" provisions of the second paragraph of Article IV were intended to be separate from the limitations on carrying out military activities in outer space contained in the first paragraph. During the treaty negotiations, several United Nations delegations questioned the propriety of excluding outer space from the coverage of the second paragraph.¹⁰¹ In conclusion, as SDI does not envision deployment of any missile defense system on the moon or other "celestial body," it cannot violate the second

⁹⁵U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 88, U.N. Doc. A/Conf. 62/122 (1982).

⁹⁶Smith, *supra* note 35, at 72.

⁹⁷See *supra* note 72.

⁹⁸*Id.*

⁹⁹Professor Bin Cheng pointed out that the language of Article I of the Antarctica Treaty of 1959, which states that "Antarctica shall be used for peaceful purposes only," and further bars any measures of a military nature in Antarctica, provided the model for the 1967 Outer Space Treaty. Therefore, he concludes, "peaceful purposes" as used in the second paragraph of Article IV, Outer Space Treaty, does not mean nonaggressive, but rather means nonmilitary. He adds that, in any event, any U.S. attempt to define "peaceful purposes" as meaning "nonaggressive" is needless, since the language applies not to outer space, but rather to celestial bodies other than Earth. Cheng, *supra* note 75, at 101-04; see Kopal, *supra* note 74, at 17.

¹⁰⁰Outer Space Treaty, *supra* note 60, art. III.

¹⁰¹Notably, the Indian, Iranian, Austrian, Japanese, Brazilian, and Mexican delegates. U. Ra'anani & R. Pfaltzgraff, Jr., *supra* note 71, at 215.

paragraph of Article IV. Nor can the "peaceful purposes" provisions in the second paragraph detract from the permissible military activities allowed by the first paragraph of Article IV.

We are left to a careful examination of the first paragraph of Article IV. The first paragraph of Article IV states: "States parties to the treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other **manner**."¹⁰² The relevant portion for SDI concerns the prohibition against placing in outer space objects carrying "nuclear weapons or any other kinds of weapons of mass destruction." The treaty does not define these terms. But an examination of U.N. General Assembly resolutions, along with the negotiating history and U.S. pronouncements immediately preceding the Outer Space Treaty, reveals that the prohibition in Article IV is not novel.¹⁰³ The article does not prohibit stationing of any other types of weapons in outer space, nor does it prohibit the use of outer space for military purposes in any other way. Thus, the first paragraph of Article IV permits states to use all of outer space for whatever military purposes they deem necessary, so long as it is not for an aggressive purpose (Article 111), and so long as it does not involve stationing nuclear weapons or weapons of mass destruction.¹⁰⁴ Advocates of a ballistic missile defense urge that the Outer Space Treaty thereby permits most, if not **all**, envisioned defensive space weapons.¹⁰⁵

There does not appear to be much dispute concerning defining "weapons of mass destruction." Then-Deputy Secretary of Defense Cyrus R. Vance, responding to congressional questioning during the ratification process, stated: "I believe it would include such other weapon systems as chemical and biological weapons . . . , or any weapon which might be developed in the future

¹⁰²Outer Space Treaty, *supra* note 60, art. IV.

¹⁰³General Assembly Resolution 1884, unanimously adopted on October 17, 1963, called upon States to refrain from placing into orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner. G.A. Res. 1884, 18 U.N. GAOR Supp. (No. 15) at 13, U.N. Doc. A15515 (1963). This resolution was quickly followed on December 13, 1963, by General Assembly Resolution 1962, which formed the basis for the Outer Space Treaty. G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. Doc. A15515 (1963). For a summary of the drafting process, see Dembling & Arons, *The Evolution of the Outer Space Treaty*, 33 J. Air L. Com. 419 (1967).

¹⁰⁴Cheng, *supra* note 75, at 101-02; Menter, *supra* note 79, at 585.

¹⁰⁵D. Graham, *supra* note 45, at 60.

which would have the capability of mass destruction such as that which would be wreaked by nuclear **weapons**.”¹⁰⁶ Former U.S. Ambassador to the U.N. Arthur Goldberg stated that weapons of mass destruction were those “of comparable capability of annihilation to a nuclear **weapon**.”¹⁰⁷ The term is generally understood to mean nuclear, chemical, biological, or radiological weapons capable of causing indiscriminate death to masses of people, or devastation to large areas of property.¹⁰⁸ It does not include conventional weapons such as explosives, projectiles, and missiles. Neither are the envisioned SDI beam weapons prohibited because their success depends on the ability to zero-in on a small target, such as an offensive missile in flight.¹⁰⁹

The first paragraph of Article IV explicitly bans the placing of “nuclear weapons” in outer space. In this regard, technology associated with the nuclear powered x-ray laser¹¹⁰ could present treaty compliance problems. Despite President Reagan’s description of SDI as a nonnuclear defense shield against Soviet missiles, the Strategic Defense Initiative Organization in December 1985 requested Congress provide an additional \$100 million in research funds to accelerate underground tests of x-ray laser components to determine its feasibility.¹¹¹ The nuclear x-ray laser is powered by a small nuclear explosion that produces a powerful pulse of intense x-rays. In the course of firing, the device itself naturally is destroyed by the nuclear detonation.¹¹² Therefore, a nuclear explosion in outer space is part of the operation of the weapon.

The x-ray laser raises two additional legal issues. First, is the weapon a “nuclear weapon” as defined in the first paragraph of Article IV? And second, if it is a “nuclear weapon,” will the contemplated weapon be placed in “orbit” or “stationed” in outer space? Milton L. Smith, Director of Space Law and International Law, Headquarters, U.S. Air Force Space Command, warns that

¹⁰⁶Hearings on the Outer Space Treaty Before the Senate Foreign Relations Committee, 90th Cong., 1st Sess. 100 (1967), *quoted in* U. Ra’anan & R. Pfaltzgraff, Jr., *supra* note 71, at 216. Vance added that military space programs concerned with communications, navigation, or surveillance are permitted, as they are peaceful uses of space. *See also* D. Graham, *supra* note 45, at 60.

¹⁰⁷“Hearings on the Outer Space Treaty Before the Senate Foreign Relations Committee. 90th Cong., 1st Sess. 76 (1967), *quoted in* Smith, *supra* note 35, at 70 n.95.

¹⁰⁸*See generally* J. Pournelle & D. Ing, *supra* note 24, at 101; Mallison, *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 Geo. Wash. L. Rev. 308 (1967); Smith, *supra* note 35, at 70.

¹⁰⁹Danielson, *supra* note 71, at 2; *see supra* note 108.

¹¹⁰*See supra* text accompanying note 50.

¹¹¹Wash. Post, Dec. 13, 1985, at A47, col. 4.

¹¹²J. Pournelle & D. Ing, *supra* note 24, at 58-61.

the nuclear x-ray laser is a "nuclear weapon" that would violate Article IV of the Outer Space Treaty.¹¹³ Unable to find any other treaty definition of "nuclear weapon," he used the definition in the Latin America Nuclear-Free Zone Treaty,¹¹⁴ which defines it as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes."¹¹⁵ Smith argues that the x-ray laser clearly would have characteristics "appropriate for use for warlike purposes," and that the nuclear detonation would release nuclear energy in an "uncontrolled manner" since the weapon itself would also be destroyed.¹¹⁶ In other words, the collateral "effect" of the detonation associated with the nuclear-powered x-ray laser, as opposed to its intended use as a precision beam weapon, makes the weapon particularly onerous. The extent of potential indiscriminate harm resulting from the detonation is the important key to determining whether it may be considered a "nuclear weapon."

Some hard-core advocates of SDI contend that, in any event, since the x-ray laser device will be launched into space upon warning of a Soviet missile attack, and its passage in outer space will be brief, it is not a nuclear weapon placed in "orbit" or "stationed" in outer space.¹¹⁷ They support the argument by examining the concerns that prompted the proscriptions in paragraph 1. During the 1960s, states were examining the possibility of placing nuclear bombs in orbit which, upon command, would drop out of orbit onto targets. Thus, the chief

¹¹³Smith, *supra* note 35, at 71.

"Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 281, *reprinted in* U.S. Arms Control and Disarmament Agency, *supra* note 63, at 64.

¹¹⁵*Id.* art. V.

¹¹⁶Smith, *supra* note 35, at 71. Recent tests of the nuclear-powered x-ray laser apparently lend some support to Smith's contention that the released nuclear energy is "uncontrolled." Ray E. Kidder, a weapons designer at the Lawrence Livermore National Laboratory, where much of the research on the weapon is progressing, reportedly believes that the violence of the nuclear explosion will not allow sufficiently accurate targeting of x-rays to enable the device to destroy Soviet missiles in flight. Instead, he *sees* the weapon as a *kind* of "searchlight" to destroy "soft" targets in space, such as satellites. Wash. Post, June 9, 1986, at A1, col. 3. *This* assessment tracks with that of one SDI official who recently stated that the nuclear-powered x-ray laser "is primarily being considered because of its counterdefense applications"—in other words, as a weapon to defeat components of a Soviet Star Wars system. Wash. Post, May 4, 1986, at A12, col. 1. Kosta Tsipis, a physicist at the Massachusetts Institute of Technology, claims that the weapon still will generate the other effects of today's nuclear bombs. In his words, "a nuclear weapon is a nuclear weapon is a nuclear weapon." Wash. Post, June 9, 1986, at A6, col. 1.

¹¹⁷J. Pournelle & D. Ing, *supra* note 24, at 101-02.

concerns were "orbital" weapons of mass destruction; full orbit of the weapon was regarded as necessary to make it an orbital weapon within the Outer Space Treaty's prohibitions. As a result, nuclear or mass destruction weapons such as the Fractional Orbital Bombardment System considered during the 1960s, which would be fired into a low orbit but which would not make a **full** orbit, are regarded as technically outside treaty prohibitions. Also, the provision did not intend to outlaw the passage of intercontinental ballistic missiles, which do not travel a **full** orbit before impact.¹¹⁸

A counter-argument is that advocates of the weapon rest on a too literal reading of Article IV that would render its purpose meaningless; that the requirement for a **full** orbit is not stated; and that, in any event, because the weapon must pause in space before firing, it is distinct from the ballistic missile, which only passes through space.¹¹⁹ The counter-argument in many respects is attractive, particularly because it deemphasizes the technical requirement for a full orbit. Nevertheless, the technical requirement was an intentional element of the negotiated provision. As a result, unless the nuclear-powered x-ray is placed in orbit or stationed in space in some other manner, it does not violate the Outer Space Treaty.

Politically, the Outer Space Treaty has not been a major point of contention in the U.S.-USSR debate over **SDI**, probably because both superpowers realize that outer space already is "militarized." Practically speaking, the military may benefit from

¹¹⁸S. Lay & H. Taubenfeld, *supra* note 79, at 27; Bridge, *International Law and Military Activities in Outer Space*, 13 Akron L. Rev. 649, 655 (1980); Reed & Norris, *Military Use of the Space Shuttle*, 13 Akron L. Rev. 665, 670 (1980) *see* Gallagher, *Legal Aspects of the Strategic Defense Initiative*, 111 Mil. L. Rev. 11, 40 (1986).

¹¹⁹Article 32, Vienna Convention on the Law of Treaties, allows recourse to supplementary means of treaty interpretation, including the circumstances of its conclusion, when application of the "ordinary meaning" rule "leads to a result which is manifestly absurd or unreasonable." I. Brownlie, *supra* note 91, at 624-25. Applying these principles, if weapons of "mass destruction" generally are regarded as including such things as biological, chemical, or radiological **agents**—i.e., agents possessing the potential for mass indiscriminate death—then the deployment of weapons having nuclear components in a substantial quantity must be potentially dangerous to the extent that they similarly must fall within the proscriptions of Article IV. Also, depending on the length of the "pause" contemplated for the nuclear-powered x-ray laser in space, the weapon might be regarded as "stationed" in space. This logic applies regardless of whether the weapon is placed in "orbit." *See* T. Longstreth, J. Pike & J. Rhineland, *The Impact of U.S. and Soviet Ballistic Missile Defense Programs on the ABM Treaty* 64 (3d ed. 1985); Bridge, *supra* note 118, at 656. The former publication is a report for the "National Campaign to Save the ABM Treaty."

almost every use of outer space, regardless of the agency or state that sponsors the mission.¹²⁰ Practices involving military use of outer space include military satellites,¹²¹ use of manned space flights for military missions,¹²² and use of outer space as the flight path for nuclear-armed offensive ballistic missiles.¹²³ Perhaps because of this, the Soviet Union periodically brings the issue of "militarization of outer space" before the United Nations, where it may obtain more political mileage for its stated efforts towards demilitarizing space, rather than resorting to impracticable negotiations with the United States on the point.

Another reason exists for the Soviet Union's resolve to place the militarization of outer space issue before the United Nations, instead of negotiating a solution bilaterally with the United States. The Outer Space Treaty placed the Soviet Union in a dilemma. Soviet policymakers and jurists traditionally interpreted "peaceful purposes" as "nonmilitary."¹²⁴ By limiting "peaceful purposes" to "the moon and other celestial bodies" without extending it to objects placed in orbit, the USSR compromised on its prior emphasis for complete demilitarization of outer space. In an attempt to accommodate previous Soviet doctrine to the new Outer Space Treaty, Soviet jurists formulated a new approach in which they interpreted the Outer Space Treaty as advocating the "complete demilitarization of the moon and other celestial bodies," but only the "partial demilitarization of outer space."¹²⁵ In effect, this is close to the U.S. view, which allows "nonaggressive" use of outer space. But, in the Soviet view, this is not a permanent state of affairs. In their view, states might agree at a later time to amend the Outer Space Treaty in order to achieve

¹²⁰S. Lay & H. Taubenfeld, *supra* note 79, at 100.

¹²¹The development of space-based "killer" satellites opens up frustrating new questions that negotiators are attempting to resolve in current antisatellite treaty negotiations. See generally R. Jastrow, *supra* note 9, at 54-66; J. Pournelle & D. Ing, *supra* note 24, at 107-08. Nuclear-powered satellites have been used since 1961. Jasentuliyana, *A Perspective of the Use of Nuclear Power Sources in Outer Space*, 4 *Annals Air & Space L.* 255, 259 n.21 (1972), cited in Smith, *supra* note 35, at 71 n.101.

¹²²The U.S. space shuttle has flown military missions. Reed & Norris, *supra* note 118, at 684-85.

¹²³The general contention is that offensive missiles do not go into "orbit" during their brief passage through outer space and, therefore, are not proscribed. See U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 216; *supra* text accompanying note 118.

¹²⁴S. Lay & H. Taubenfeld, *supra* note 79, at 99; Russell, *Military Activities in Outer Space: Soviet Legal Views*, 25 *Harv. Int'l L.J.* 153, 172 (1984).

¹²⁵C. Christol, *supra* note 79, at 28-29. S. Lay & H. Taubenfeld, *supra* note 79, at 99; Russell, *supra* note 124, at 172; Zhukov, *Tendencies and Prospects of the Development of Space Law: the Soviet Viewpoint*, in *New Frontiers in Space Law* 79-81 (E. McWhinney & M. Bradley ed. 1969).

the total demilitarization of outer space. Until then, the use of outer space for peaceful purposes would remain the stated goal. In this way, the Soviet Union could continue to attack American space efforts as "military," thus contrasting them with the solely "peaceful" space activities of the Soviet Union.¹²⁶

B. UNITED NATIONS PRONOUNCEMENTS

The primary United Nations body through which outer space law develops is the Committee on the Peaceful Uses of Outer Space (COPUOS). Any attempts to modify the legal regime with respect to outer space law in the United Nations likely will originate there. COPUOS evolved out of a series of proposals submitted to the United Nations by the United States and the Soviet Union, beginning in 1958, urging international cooperation in the field of outer space.¹²⁷ Its early efforts at defining the legal regime resulted in adoption of several General Assembly resolutions that purported to represent the then-present rules of international law. General Assembly Resolution 1721, adopted December 20, 1961, specifically addressed the beneficial uses of space by telecommunications satellites, but its important preamble is cited for stating the theme that "the common interest of mankind is furthered by the peaceful uses of outer space . . . [and] that the exploration and use of outer space should be only for the betterment of mankind and to the benefit of States."¹²⁸ It also extended international law and the provisions of the U.N. Charter to the outer space legal regime.¹²⁹ This was followed by General Assembly Resolution 1962, December 13, 1963, which again emphasized the theme that outer space use should be for peaceful

¹²⁶C. Christol, *supra* note 79, at 25; S. Lay & H. Taubenfeld, *supra* note 79, at 99; Russell, *supra* note 124, at 172-74; Zhukov, *supra* note 125, at 79-81.

¹²⁷For a brief history of COPUOS, see generally C. Christol, *supra* note 79, at 13-20. Secretary of State Dulles on September 18, 1958 proposed to the General Assembly that it establish an Ad Hoc Committee "to prepare for a fruitful program on international cooperation in the peaceful uses of outer space." 39 Dep't St. Bull. 529 (1958), *quoted in id.* at 13. This committee's first report was adopted on December 13, 1958 as Resolution 1348, which set the tone for the development of international space law by stressing that outer space should be used for peaceful purposes only. The resolution also established the Ad Hoc Committee on the Peaceful Uses of Outer Space. On December 12, 1959, that committee became a permanent body of the General Assembly when General Assembly Resolution 1472 created the Committee on the Peaceful Uses of Outer Space (COPUOS). With the establishment of COPUOS, representatives of less-developed states joined in committee deliberations, which previously were dominated by the principle space resource States. *Id.* at 14-16.

¹²⁸G.A. Res. 1721, 16 U.N. GAOR Supp. (No. 17) at 6, 7, U.N. Doc. A/5100 (1961), *reprinted in* S. Lay & H. Taubenfeld, *supra* note 79, at 253.

¹²⁹*Id.*

purposes;¹³⁰ and by General Assembly Resolution 1884, October 17, 1963, which reiterated Resolution 1721 and further requested all States "[t]o refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner."¹³¹

Whatever the legal effect of these resolutions as declaratory of then-existing international law,¹³² the "peaceful purposes" principles espoused therein were modified to some extent by their exclusion from "outer space" pursuant to Article IV of the Outer Space Treaty.¹³³ COPUOS, never satisfied with the state of affairs left by Article IV,¹³⁴ and finding a willing partner in the Soviet Union, continues to encourage U.N. declarations that attempt to extend "peaceful purposes" to all of outer space, in addition to the moon and other celestial bodies.¹³⁵

Several recent proposals were submitted to U.N. bodies for draft agreements to prevent an arms race in space. Italy presented one to the Committee on Disarmament in 1979, calling for an "Additional Protocol" to the Outer Space Treaty that would extend "peaceful purposes" to all of Article IV.¹³⁶ Before the Italian proposal could get off the ground, the Soviet Union, in August 1981, submitted its Draft Treaty on the Prohibition of the

¹³⁰G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. Doc. A/5515 (1963), reprinted in S. Lay & H. Taubenfeld, *supra* note 79, at 255.

¹³¹G.A. Res. 1884, 18 U.N. GAOR Supp. (No. 15) at 13, U.N. Doc. A15515 (1963), reprinted in S. Lay & H. Taubenfeld, *supra* note 79, at 254-55.

¹³²The legal effect of U.N. General Assembly Resolutions presents interesting ancillary legal issues. The U.N. Charter does not grant to the General Assembly the power to make international law; rather, resolutions generally are regarded as recommendations only, which are not binding on member States. Nevertheless, some commentators called G.A. Resolutions 1721 (XVI) and 1962 (XVIII) the existing space law. A more tenable view is that the resolutions merely restated customary international law with respect to outer space; and because the General Assembly was the authority that was restating the existing principles, the resolutions attained more weight as proper statements of the law than otherwise would have been the case. See S. Lay & H. Taubenfeld, *supra* note 79, at 81-87.

¹³³See *supra* text accompanying note 101.

¹³⁴The US-USSR view that the peaceful purposes concept should extend only to the moon and other celestial bodies was criticized by some members of COPUOS when Article IV of the Outer Space Treaty was being drafted. C. Christol, *supra* note 79, at 24.

¹³⁵Kopal, *supra* note 74, at 23. Certain recent sessions of COPUOS reportedly have been heated; and the United States, frustrated by COPUOS' apparent inability to successfully address the question of limitation of defensive weapons, raised the possibility that it might withdraw its COPUOS delegation. Dula, *Private Sector Activities in Outer Space*, 19 Int'l Law. 159 (1985).

¹³⁶J. Goldblat (Stockholm International Peace Research Institute), Arms Control Agreements 57.58 (1983); Danielson, *supra* note 71, at 4.

Stationing of Weapons of Any Kind in Outer Space.¹³⁷ It was referred to the Committee on Disarmament rather than to COPUOS. The draft posed a number of problems—particularly Article 1, paragraph 1, which provides: “Parties undertake not to place in orbit around the Earth objects carrying weapons of any **kind**.”¹³⁸ Nor could States “install such weapons on celestial bodies or station such weapons in outer space in any other manner, including on reusable manned space vehicles” of existing or future **types**.¹³⁹ Most significantly, by not defining “weapons of any kind,” the article would change the first paragraph of Article IV of the Outer Space Treaty by expanding the existing prohibitions, which encompass only nuclear weapons or any other weapons of mass destruction.¹⁴⁰

Article 1 of the Soviet draft also relates only to the placing or stationing of weapons in orbit around Earth. This fails to cover systems that are designed to be launched from Earth and to collide with the target in space without ever going into orbit. It also fails to include prohibitions on developing or testing space weapons. Further, it seems questionable for the Soviet Union to single out “reusable manned space vehicles”—a provision that clearly is targeted at the U.S. space shuttle—particularly as different kinds of weapons could be mounted on different kinds of space vehicles, reusable or disposable, manned or unmanned.¹⁴¹ By prohibiting **all** weapons, even defensive ones, the draft by implication also limits a space object in exercising a right of self-defense. This represents, in effect, an amendment of Article 51 of the U.N. Charter¹⁴² and of customary international law regarding self-defense. This could make a violation of Article 1 a form of aggression, and any State could shoot down any armed space object. In this manner, the draft also could affect provisions of Article III of the Outer Space Treaty, which applies the

¹³⁷U.N. Doc. **Ai361192** (1981), reprinted in U. Ra'anán & R. Pfaltzgraff, Jr., *supm* note 71, at 307 [hereinafter 1981 Soviet Draft Treaty]. Regarding the draft treaty Leonid Brezhnev declared: “May the shoreless ocean of outer space be clean and free of any weaponry. We are in favor of deploying joint efforts to achieve that great humanitarian aim: the prevention of militarization of outer space.” *Quoted* in Russell, *supra* note 124, at 174 n.137.

¹³⁸1981 Soviet Draft Treaty, *supra* note 137, art. 1.

¹³⁹*Id.*

¹⁴⁰*See* C. Christol, *supm* note 79, at 29; Russell, *supra* note 124, at 188-90; U. Ra'anán & R. Pfaltzgraff, Jr., *supra* note 71, at 234-37; Danielson, *supm* 71, at 6.

¹⁴¹U. Ra'anán & R. Pfaltzgraff, Jr., *supra* note 71, at 234-35; Danielson, *supra* note 71, at 6; Russell, *supra* note 124, at 189. Russell notes that the weapon-carrying potential of the shuttle greatly worries the Soviets, and they are interested in preventing it from being used in any way associated with SDI. *Id.* at 186-87.

¹⁴²U.N. Charter art. 51.

self-defense principles of Article 51 of the U.N. Charter.¹⁴³ It is noteworthy that the proposal did not seek to completely demilitarize outer space—it made no effort to prohibit military uses of space such as communications and surveillance activities.¹⁴⁴ Whether the Soviet Union intended the 1981 draft to amend, replace, or supplement the 1967 Outer Space Treaty is **unclear**.¹⁴⁵ In any event, the Soviets did not treat their draft treaty as a high priority item; indications are that the proposal was merely a sounding device or a propaganda ploy.¹⁴⁶

The Soviet Union's negotiating position changed significantly in 1983. A letter from Foreign Minister Andrei Gromyko to the U.N. Secretary-General submitted a new, more comprehensive "Draft Treaty on Banning the Use of Force in Space and From Space With Respect to the **Earth**."¹⁴⁷ Like the 1981 Soviet draft, it too was treated as a "disarmament," as opposed to COPUOS, matter.¹⁴⁸ The 1983 draft addresses many of the defects in the 1981 draft treaty. Article 1 contains a broad prohibition on the use of force "with regard to space objects orbiting the Earth, stationed on celestial bodies, or deployed in space in any other **manner**."¹⁴⁹ It thereby prohibits the use of force by space objects and against space objects. Article 2 makes this provision concrete by prohibiting the testing and deploying of "space-based weapons" and by prohibiting the use of space objects as a *means* of hitting targets on the Earth, in the atmosphere, or in space. It also pledges states not to "destroy, damage, or disrupt" the

¹⁴³U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 237; Outer Space Treaty, *supra* note 60, art. III. Sune Danielson pointed out additional problems with the 1981 Soviet proposal: Article 2 could be used to justify retaliatory actions against space vehicles which, in the opinion of one country, are not used in accordance with international law, in the interest of maintaining international peace and security, etc.; and Article 3, which provides that no party may take any hostile action toward space objects "if such objects were placed in orbit in strict accordance" with Article 1, permits use of force and interference against or the disturbance of space objects that *one* State considers to be a weapon. Danielson contends that this would be contrary to Article 2, paragraph 4 of the U.N. Charter, which prohibits use of force, and could add to international tensions. Danielson, *supra* note 71, at 5-7; *see also* Russell, *supra* note 124, at 189.

¹⁴⁴C. Christol, *supra* note 79, at 29.

¹⁴⁵Soviet Foreign Minister Gromyko, in an August 10, 1981 letter to the U.N. Secretary-General that requested inclusion of the draft treaty as a General Assembly agenda item, characterized the proposal as a supplementary treaty in order to reduce the "danger of the militarization of outer space." The letter is reprinted in U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 305.

¹⁴⁶Russell, *supra* note 124, at 189-90.

¹⁴⁷Draft Treaty on Banning the Use of Force in Space and From Space With Respect to Earth, U.N. Doc. A1381194 (1983), *reprinted in* 12 J. Space L. 92 (1984) [hereinafter 1983 Soviet Draft Treaty].

¹⁴⁸Kopal, *supra* note 74, at 22.

¹⁴⁹1983 Soviet Draft Treaty, *supra* note 147, art. 1.

normal functioning of other states' space objects, nor to change their flight trajectories. Testing or creating new anti-satellite systems is prohibited, and existing systems are to be destroyed. Further, it prohibits testing or using manned spacecraft for any military purposes.¹⁵⁰

Problems abound with the 1983 draft treaty. If adopted, the space-based portions of SDI clearly would be **prohibited**.¹⁵¹ Apparently, land-based missile defense systems would be spared and states could continue "development," as opposed to testing and deploying, of weapons for use in space.¹⁵² Also, like the 1981 proposal, the 1983 Soviet draft singles out "manned spacecraft." By not clearly defining "military purposes," old misunderstandings about the meanings of "military" and "peaceful" purposes could **resurface**,¹⁵³ and ultimately could unduly restrict future use of the U.S. space **shuttle**.¹⁵⁴ The 1983 draft has not become a treaty, but it may be regarded as representing a growing consensus in the United Nations that something must soon be done to retard the growing arms race in space. Indicative of this trend, the General Assembly continues to adopt resolutions¹⁵⁵ with titles like "Preventing an Arms Race in Outer **Space**."¹⁵⁶

C. CURRENT STATUS

In conclusion, the ballistic missile defense systems being considered under SDI do not violate the Outer Space Treaty. The Soviet Union generally appears to agree with this on a bilateral basis; nevertheless, it does not feel itself constrained from using the United Nations as a forum for attacking SDI, using traditional arguments concerned with "peaceful purposes" and disarmament ideals. The United States thereby finds itself compelled either to adopt resolutions that call upon states to prevent activities in outer space that already have occurred, or to oppose

¹⁵⁰*Id.* art. 2; Danielson, *supra* note 71, at 3; Russell, *supra* note 124, at 190-91.

¹⁵¹Danielson, *supra* note 71, at 8; Dula, *supra* note 135, at 166-67.

¹⁵²Danielson, *supra* note 71, at 8.

¹⁵³*See supra* text accompanying note 92.

¹⁵⁴Russell, *supra* note 124, at 191.

¹⁵⁵G.A. Res. 38/80, adopted December 15, 1983, is indicative. The General Assembly called upon all States, particularly those with major space capabilities, "to undertake prompt negotiations under the auspices of the United Nations with a view to reaching agreement or agreements designed to halt the militarization of outer space and to prevent an arms race in outer space, thus contributing to the achievement of the internationally accepted goal of ensuring the use of outer space exclusively for peaceful purposes." *Quoted in* Kopal, *supra* note 74, at 24.

¹⁵⁶G.A. Res. 36/97C, U.N. Doc. A/Res/36/97 (1981), cited in Menter, *supra* note 79, at 592. The resolution received the U.S. vote for adoption.

them and become seen as the primary advocate for extending the arms race in the "pristine heavens."

111. THE "ANTI-BALLISTIC MISSILE TREATY": THE HEART OF THE PROBLEM

The United States and the Soviet Union signed the ABM Treaty on May 26, 1972.¹⁵⁷ Following the advice and consent of the U.S. Senate and President Nixon's ratification, the treaty became effective on October 3, 1972.¹⁵⁸ The ABM Treaty was the result of the first series of Strategic Arms Limitation Talks (SALT I), which extended from November 1969 to May 1972. SALT I resulted in two agreements: the ABM Treaty and an "Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms,"¹⁵⁹ which itself is commonly referred to as SALT I.¹⁶⁰

A. BACKGROUND TO THE ABM TREATY

The Preamble of the ABM Treaty defines the parties' intent in concluding the agreement: "[E]ffective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in risk of outbreak of war involving nuclear weapons . . ."¹⁶¹ The treaty thereby implicitly acknowledged the strategic reality of that time. Nationwide defenses against ballistic missile attack were not yet so technologically advanced that they could overcome at an acceptable cost the less expensive offensive missiles of

¹⁵⁷ABM Treaty, *supra* note 4.

¹⁵⁸*Id.*

¹⁵⁹SALT I, *supra* note 62.

¹⁶⁰For the text and negotiation history of these two agreements, see U.S. Arms Control and Disarmament Agency, *supra* note 63, at 132-57. On January 20, 1969, the day that President Nixon entered office, the Soviet Foreign Ministry sent a statement expressing willingness to discuss strategic arms limitations. Discussions in this regard had been going on and off during the Johnson Administration, but had broken off indefinitely after the Soviet invasion of Czechoslovakia in August 1968. Nixon expressed interest in renewing talks, and in October, the White House and the Kremlin announced that talks would begin in Helsinki on November 17, 1969. Gerard Smith, Director of the Arms Control and Disarmament Agency, was named to head the U.S. delegation and led it throughout the SALT I negotiations. Both sides agreed the talks would be private, free and frank. Sessions thereafter rotated between Helsinki and Vienna. Finally, at a summit meeting in Moscow, President Nixon and General Secretary Brezhnev signed, on May 26, 1972, the ABM Treaty and the Interim Agreement on strategic offensive arms. *Id.* at 133-35.

¹⁶¹*Id.* at 139.

the other side.¹⁶² Further, large-scale deployment of missile defenses, it was thought, would lessen the stability of the strategic balance because it would inevitably stimulate an arms race in offensive missiles to penetrate the opponent's defensive shield.¹⁶³ Conversely, it was felt that agreed limits on ABM systems might, as the ABM Treaty Preamble states, "contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms."¹⁶⁴ This reasoning has prompted critics of the ABM Treaty to characterize the agreement as a codification of MAD, since it preserved the theory that nuclear war would be deterred on the basis of the ability of nuclear offensive forces to mutually destroy each other.¹⁶⁵

Circumstances in the United States and in the Soviet Union at the time favored continued reliance on offensive forces as opposed to ballistic missile defense. As noted earlier, costly piecemeal missile defense was unpopular in the United States, and MAD was in its heyday.¹⁶⁶ United States perceptions were that the expanding Soviet ABM system around Moscow, if not completely effective, was enough of a threat to a U.S. retaliatory force as to be highly destabilizing strategically.¹⁶⁷ Therefore, U.S. policy-makers favored the status quo — i.e., limited defenses — as the most stable strategic environment. Soviet perceptions were somewhat different, but they too gravitated toward limiting missile defenses. The Soviets were conscious of deficiencies in their ABM system, whose strength the United States exaggerated. When the United States actually began to deploy Safeguard, the Soviets were alarmed at what they perceived to be superior U.S. missile defense technology.¹⁶⁸ They also were concerned that their defensive systems would be overwhelmed by U.S. advances in MIRV

¹⁶²T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 3-4; Nitze, Bureau of Public Affairs, U.S. Dep't of State, Current Pol. No. 711, SDI and the ABM Treaty 1 (1985); Christian Science Monitor, Nov. 4, 1985, at 29, col. 4.

¹⁶³T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 3-4; Nitze, *supra* note 162, at 1; Christian Science Monitor, Nov. 4, 1985, at 29, col. 4.

¹⁶⁴ABM Treaty, *supra* note 4, preamble. Because the ABM Treaty was seen as a prerequisite to offensive ballistic missile reductions, one can see that the ABM Treaty and the Interim Agreement, which covered certain aspects of strategic missiles, are linked not only in their strategic effects, but also in their relationship to future negotiations to limit offensive missiles. U.S. Arms Control and Disarmament Agency, *supra* note 63, at 135.

¹⁶⁵Christian Science Monitor, Nov. 4, 1985, at 29, col. 4.

¹⁶⁶See *supra* text accompanying notes 36, 40.

¹⁶⁷See *supra* text accompanying note 41.

¹⁶⁸See Ermath, *Contrasts in American and Soviet Strategic Thought*, in American Defense Policy, *supra* note 33, at 65; Schlesinger, *Rhetoric and Realities in the Star Wars Debate*, 10 Int'l Security 12 (1985); *supra* text accompanying note 34.

(multi-warhead) ballistic missile technology.¹⁶⁹ So, from the Soviet viewpoint, the ABM Treaty provided an opportunity to halt U.S. technological advances and to slow down U.S. MIRV and ballistic missile programs.¹⁷⁰

The ABM Treaty often is referred to as "the cornerstone of the present arms control regime,"¹⁷¹ or "the principle accomplishment of strategic arms control."¹⁷² Marshal Sergei Akhromeyev, Chief of Staff, Soviet Armed Forces, views the ABM treaty "of fundamental importance for the entire process of nuclear arms limitation. Even more, it is the basis on which strategic stability and international security rest."¹⁷³ Its critics counter that the treaty is only of "symbolic value" to arms-control advocates.¹⁷⁴ The latter view has much merit, particularly in view of Soviet ballistic missile defense research and development programs, which have continued little interrupted since the 1972 treaty signing.¹⁷⁵ Present scientific developments and emerging technologies that today offer the possibility of defenses inconceivable in 1972, coupled with disappointment over the failure of ABM to propel the superpowers toward meaningful arms limitations, fuel those who view the ABM Treaty as antiquated.¹⁷⁶

B. DEFINING ABM SYSTEMS

Generally speaking, the ABM Treaty bans a territorial ballistic missile defense system, but permits the development, testing, and deployment of fixed, ground-based radars, interceptor missiles, and interceptor missile launchers under very tight constraints. The development, testing, or deployment of sea-based, air-based, space-based, or mobile land-based systems or of components for such systems is prohibited.¹⁷⁷

The ABM Treaty, in Article III, permits each country to *deploy* ABM systems or their components only in two areas—one to

¹⁶⁹See Smoke, *supra* note 33, at 121-22.

¹⁷⁰*Id.* See generally Lambeth, *What Deters? An Assessment of the Soviet View*, in American Defense Policy, *supra* note 33, at 188-96.

¹⁷¹T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at viii.

¹⁷²*Id.* at 65.

¹⁷³Wash. Post, Oct. 25, 1986, at A24, col. 1. The quote is contained in an "advertisement" paid for by the Information Department, Embassy of the USSR, Washington.

¹⁷⁴D. Graham, *supra* note 45, at 312.

¹⁷⁵Ruhle, *Gorbachev's 'Star Wars'*, NATO Review 30-32 (August 1985). Hans Ruhle is Head, Policy Planning Staff, Ministry of Defense, Federal Republic of Germany. Ruhle's article takes an in-depth look at Soviet missile defense developments as a continuum that was not interrupted by the ABM Treaty.

¹⁷⁶U.S. Dep't of State, *supra* note 5, at 1; Nitze, *supra* note 162, at 2.

¹⁷⁷ABM Treaty, *supra* note 4; see Nitze, *supra* note 162, at 1.

protect the national capital, and another to protect a ballistic missile launching base.¹⁷⁸ A 1974 Protocol limits each state to its choice of only one site.¹⁷⁹ The ABM deployment areas are limited to a radius of 150 kilometers, and may contain no more than 100 ABM interceptor missiles and 100 ABM launchers. The area around the capital may contain no more than six ABM radar complexes, and the area around the missile base may contain two large "phased-array" ABM radars and no more than eighteen smaller ABM radars.¹⁸⁰ Under Article I, an ABM defense system "for a defense of the territory" of either State specifically is prohibited.¹⁸¹ Following these limits, the United States chose to maintain a Safeguard ABM site at a missile base near Grand Forks, North Dakota; but that site subsequently was deactivated and the United States now has no operational ABM site.¹⁸² The Soviet Union elected to retain its ABM site to defend Moscow, and it remains the only operational ABM site permitted by the ABM Treaty.¹⁸³

Article II of the ABM Treaty defines an ABM "system" as "a system to counter strategic ballistic missiles or their elements in flight trajectory, *currently consisting of*: (a) ABM interceptor missiles ... (b) ABM launchers ... (c) ABM radars."¹⁸⁴ The treaty does not mention lasers, particle beams, or any of the other "exotic" technologies being considered under SDI. Because of this, many ABM Treaty critics argue that Article II explicitly

¹⁷⁸ABM Treaty, *supra* note 4, art. III.

¹⁷⁹Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, reprinted in U.S. Arms Control and Disarmament Agency, *supra* note 63, at 162.

¹⁸⁰ABM Treaty, *supra* note 4, art. 111.

¹⁸¹*Id.* art. I, ¶ 2.

¹⁸²The Grand Forks system was put into operation in 1975, but was deactivated after only a few months because of high operating costs and negligible military utility. T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 12; S. Huntington, *supra* note 34, at 156.

¹⁸³The Galosh ABM-1, the mainstay of the Moscow system, became operational in the late 1960s. Four sites with a total of 64 launchers were constructed around Moscow. Since the mid-1970s, the Soviets have been working to upgrade the ABM-1 through development of the new ABM-X-3, which may already be operational around Moscow. T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 12; S. Huntington, *supra* note 34, at 156. The U.S. Department of Defense reports that since 1980, the Soviets have been upgrading and expanding the Moscow system so that they now are approaching the 100 launchers permitted by the ABM Treaty. The new system will consist of a 2-layer defense of silo-based long-range Galosh interceptors designed to engage targets outside the atmosphere; silo-based high-acceleration interceptors designed to engage targets within the atmosphere; new engagement and guidance radars; and a large radar for controlling ABM engagements. U.S. Dep't of Defense, *supra* note 28, at 47-48.

¹⁸⁴"ABM Treaty, *supra* note 4, art. II (emphasis added).

limits the definition of an ABM system to the particular technologies cited in the article: ABM interceptor missiles, launchers, and radars.¹⁸⁵ A logical conclusion from this line of thinking is that, since they were not then "currently" available, the new technologies are not the kinds of "ABM systems" that are limited by the ABM Treaty; therefore, they may be developed and deployed without restraint.

A more reasonable interpretation of Article II is that the United States and the Soviet Union intended to include new "exotic" ABM technologies within the definition of "ABM systems." The use of the phrase "currently consisting of" implies that the drafters contemplated the possibility that future ABM systems could incorporate technologies other than those that were feasible at the time. Accepted rules of treaty interpretation¹⁸⁶ provide that, in determining the object and purpose of a treaty, the entire text, including its preamble, must be examined. Also, any agreement made by the parties in connection with the treaty, and subsequent practice, are to be considered.¹⁸⁷ On the day the ABM Treaty was signed, the heads of the U.S. and Soviet delegations signed another document, which contained "Agreed Statements" and "Common Understandings" that were to help clarify some elements of the text.¹⁸⁸ Agreed Statement D, which was intended to supplement Article 111, addressed the issue of new technologies "based on other physical principles." It provided:

[I]n the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, *specific limitations* on such systems and their components would be subject to discussion ... and agreement in accordance with ... the Treaty.¹⁸⁹

As Article III permits only land-based ABM systems to be deployed,¹⁹⁰ Agreed Statement D therefore provides a means by

¹⁸⁵J. Pournelle & D. Ing, *supra* note 24, at 103-04.

¹⁸⁶Vienna Convention, *supra* note 91, art. 31.

¹⁸⁷*Id.*; see Smith, *supra* note 35, at 62.

¹⁸⁸T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 5.

¹⁸⁹Agreed Statements, Common Understandings, and Unilateral Statements Regarding the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missiles, *reprinted in* U.S. Arms Control and Disarmament Agency, *supra* note 63, at 143 [hereinafter Agreed Statements] (emphasis added).

¹⁹⁰See *supra* text accompanying note 178; see also Christian Science Monitor, Oct. 1985, at 1.

which ABM systems “based on other physical principles” might be deployed within the geographical and quantitative confines of Article III. “Exotic” systems that are meant for deployment at the two land-based sites permitted under Article III may be researched, developed and tested, as the treaty does not prohibit these activities for land-based systems. But before they are deployed, specific limitations on the new systems are subject to good faith bilateral consultation. If amendments to the treaty are deemed necessary to accommodate the “exotic” land-based technology, they of course may be proposed and agreed upon by the parties.¹⁹¹

Subsequent statements of U.S. and Soviet officials demonstrate that both states consider the new technologies to be within the scope of the ABM Treaty. The Soviet Union consistently calls any deployment of the new technologies a “direct violation” of the ABM Treaty.¹⁹² The U.S. position, however, at times has been embarrassingly ambiguous and it has created a flurry of controversy at home and abroad. On October 6, 1985, then-White House National Security Affairs advisor Robert C. McFarlane, appearing on “Meet the Press,” provided what was dubbed the Reagan administration’s “new interpretation” of the ABM Treaty. McFarlane declared that Agreed Statement D “provides that research on new physical principles or other physical principles is authorized as is testing and development.”¹⁹³ He added that only deployment was foreclosed. McFarlane’s statements quickly were confirmed as representing the administration’s policy.¹⁹⁴ Gerard C. Smith, who led the ABM Treaty negotiations,

¹⁹¹Agreed Statements, *supra* note 189, Agreed Statement D; see T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 8-9.

¹⁹²Wee, *e.g.*, Wash. Post, Oct. 19, 1985, at A14, col. 3; Wash. Post, Oct. 25, 1985, at A24, col. 1; Wash. Post, Dec. 30, 1985, at A18, col. 1.

¹⁹³Christian Science Monitor, Oct. 10, 1985, at 3; L.A. Times, Oct. 11, 1985, at 4; see Wash. Post, Oct. 9, 1985, at A21, col. 1. Not surprisingly, this view has been held all along by many SDI advocates, such as J. Pournelle & D. Ing, *supra* note 24, at 105, and General Daniel Graham, *supra* note 45, at 51, 60. Surprisingly, the Stockholm International Peace Research Institute (SIPRI) appears to agree with this legal interpretation. See J. Goldblat, *supra* note 136, at 30.

¹⁹⁴Wash. Post, Oct. 9, 1985, at A21, col. 1. Assistant Secretary of Defense Richard N. Perle told reporters:

In my judgment there is one correct view of what the treaty provides After one wades through all of the ambiguities and reads carefully the text of the treaty itself and the negotiating record . . . with respect to systems based on ‘other physical principles’ . . . , we have the legal right under the treaty to conduct research and development and testing unlimited by the terms of the treaty. . . .

Christian Science Monitor, Oct. 17, 1985, at 1. According to the Washington Post, Perle and McFarlane based their statements on a 19-page report on the subject

and other previous administration officials who had been involved in arms control negotiations immediately criticized the "new interpretation." They contended that it went beyond the traditional "restrictive" interpretation, which recognized the treaty's implicit approval of research, development, and testing of fixed, land-based ABM systems, by extending these activities to the space-based systems that are envisioned under SDI.¹⁹⁵ Moreover, the "new interpretation" would permit an Agreed Statement to modify express language in Article V, which prohibits the United States and the Soviet Union from developing, testing or deploying space-based ABM systems.¹⁹⁶ Allowing the Agreed Statement to stand on an equal footing with the treaty article is contrary to accepted principles of treaty interpretation.¹⁹⁷

prepared for the Defense Department by a former New York assistant district attorney, Philip Kunsberg. Kunsberg reported that, during ABM Treaty negotiations, the United States sought a tight ban on "exotic" future ABM systems except for those in a fixed land-base mode. But, he concluded, the Soviet Union never agreed to, and in fact consistently rejected the broad ban advocated by the United States. State Department Legal Advisor Abraham D. Sofaer reportedly reviewed Kunsberg's report and agreed with its conclusion that the U.S. negotiating team had tried, but failed, to convince the Soviet Union to ban future ABM systems. In Sofaer's reported opinion the U.S. negotiators may have sincerely believed they had an agreement with the Soviets on the matter, but the record is devoid of evidence to that effect. Wash. Post, Oct. 22, 1985, at A1, A10, col. 1. A major problem in resolving the controversy is the fact that the negotiating record is classified secret.

¹⁹⁵Gerard Smith said the administration's interpretation "makes a dead letter" of the ABM Treaty, as it would make possible almost unlimited testing and development under SDI. Wash. Post, Oct. 9, 1985, at A21, col. 1. Smith added that, while some of the final language was not the best, it nevertheless was clear to him and other U.S. negotiators that the Soviets agreed to tight limits on future "exotic" ABM systems. Wash. Post, Oct. 22, 1985, at A10, col. 5. Smith even wrote a letter to the editor of the New York Times in which he stated:

[I]t was not our intention that any type of technology for space-based ABM systems could be developed or tested under the treaty. This has been the official view of the United States Government for more than 13 years. In my opinion, the Russians agree with this position, which is binding on both parties, and have stated so on a number of recent occasions. The controlling provision[] of the treaty ... is Article 5. . . .

The treaty does permit a small deployment of fixed land-based ABM missiles using traditional technology. It also permits development and testing of new technology for such fixed land-based defenses—but not deployment. The differences between the ban on deployment and testing of space-based systems, and the more limited constraints on fixed land-based systems is reflected in an agreed statement appended to the treaty (Agreed Statement D).

N.Y. Times, Oct. 23, 1985 at A22, col. 4.

¹⁹⁶Christian Science Monitor, Oct. 10, 1985, at 3; L.A. Times, Oct. 11, 1985, at 4; Wash. Post, Oct. 11, 1985, at A27, col. 1.

¹⁹⁷Vienna Convention, *supra* note 91, art. 31; I. Brownlie, *supra* note 91, at 624-30. John B. Rhineland, who was legal counsel to Gerard Smith's delegation,

The furor quickly reached Congress, where Democratic congressmen threatened to hobble the SDI **program**.¹⁹⁸ Their stated concerns centered on prior Arms Control Impact Statements submitted annually to Congress by the Arms Control and Disarmament Agency, which reflected the “restrictive” position that only research of new space-based ABM technology, and not testing or development, is permitted under the ABM **Treaty**.¹⁹⁹ NATO allies, particularly the United Kingdom and the Federal Republic of Germany, sharply questioned the “new interpretation” coming from Washington so soon before the scheduled November Reagan-Gorbachev summit.²⁰⁰ The Chief of the Soviet General Staff, Marshal Sergei F. Akhromeyev, accused the Reagan Administration of “deliberate deceit” in reinterpreting the ABM **Treaty**.²⁰¹ Secretary of State George P. Shultz responded to the attacks by persuading President Reagan to preserve key limits of the ABM Treaty. Shultz achieved a compromise under which the administration would continue to pursue the SDI program in accordance with a “restrictive interpretation” of the ABM Treaty as a measure of voluntary self-restraint, while professing agreement as a matter of law with the broad “new interpretation” which would allow virtually unrestricted SDI testing and development.²⁰² On October 14, 1985, Secretary

stated that it is wrong to argue that ABM activities flatly **ruled** out in the treaty could be sanctioned by an added statement. L.A. Times, Oct. 11, 1985, at 4. The Christian Science Monitor reported that Richard Perle opined that Agreed Statement D did not relate to Article III, and in fact overrides the restrictions in Article V. Christian Science Monitor, Oct. 17, 1985, at 1.

¹⁹⁸L.A. Times, Oct. 11, 1985, at 4. House Foreign Affairs Committee Chairman Dante B. Fascell (D-Fla.) called the Perle-McFarlane interpretation “incredible”, adding that it “jeopardizes arms control as embodied in the ABM Treaty” and “would legitimize Soviet antiballistic missile defense activities which the administration has been so critical of.” Wash. Post, Oct. 10, 1985, at A31, col. 4. Alton Frye, an **arms** expert at the Council on Foreign Relations, recalls that when the treaty was debated in the Senate Armed Services Committee in 1972, Senator Henry M. Jackson criticized the Nixon Administration for accepting limitations on the testing and development of new technologies, and that Senate advice and consent was given with the understanding that testing and development were prohibited. Christian Science Monitor, Oct. 17, 1985, at 1.

¹⁹⁹Wash. Post, Oct. 9, 1985, at 21A, col. 1; L.A. Times, Oct. 11, 1985, at 4.

²⁰⁰Wash. Post, Oct. 17, 1985, at A4, col. 1.

²⁰¹Wash. Post, Oct. 22, 1985, at A10, col. 6; Wash. Post, Oct. 25, 1985, at A24, col. 1.

²⁰²Wash. Post, Oct. 17, 1985, at A4, col. 1. Paul H. Nitze, the administration’s senior arms control advisor, reportedly played a key role in formulating Secretary Shultz’s position. Nitze reportedly took the position that, legalities aside, on the eve of the **US-USSR** summit the administration had to preserve the “restrictive interpretation” previously presented to U.S. allies, Congress, and the public. Wash. Post, Oct. 22, 1985, at A10, col. 6. The press was quick to characterize the controversy as one more example of political infighting within the administration,

Shultz began to repair the damage by reassuring NATO allies that:

Our SDI research program has been structured and, as the president has reaffirmed, will continue to be conducted in accordance with a restrictive interpretation of the treaty's obligations . . . Furthermore, any SDI deployment would be the subject of consultations with our allies and of discussion and negotiation, as appropriate, with the Soviets in accordance with the terms of the ABM Treaty.²⁰³

Shultz followed this up by reassuring NATO foreign ministers, gathered in Brussels for briefings on the upcoming summit, that "we have designed our research program to fall within the narrower definition of the ABM Treaty's provisions, and we intend to keep it that way."²⁰⁴ With the **allies** thus assuaged by Shultz's **performance**,²⁰⁵ Paul H. Nitze, special advisor to the president on arms control, reassured a House Foreign Affairs subcommittee that the "new interpretation" would not be applied to SDI.²⁰⁶

The basic issue, however, was not resolved. By not repudiating the new legal interpretation, the Administration left open the possibility that in the future it may reverse its "policy," which advocates a "restrictive interpretation" of the meaning of Agreed Statement D, in favor of the broad "new interpretation" which it professes to be the "legal" interpretation of the treaty.²⁰⁷ At least

this time between Schultz and McFarlane. Wash. Post, Oct. 18, 1985, at A33, col. 1.

²⁰³Wash. Times, Oct. 15, 1985, at 2. Schultz was speaking to representatives of the North Atlantic Assembly meeting in San Francisco.

²⁰⁴Wash. Post, Oct. 17, 1985, at A4, col. 1; Hartford Courant, Oct. 16, 1985, at 14; Wash. Post, Oct. 16, 1985, at A25, col. 5.

²⁰⁵Wash. Post, Oct. 16, 1985, at A25, col. 5.

²⁰⁶Wash. Post, Oct. 24, 1985, at A4, col. 1.

²⁰⁷In February, 1987, the issue arose again, this time provoked by Secretary of Defense Weinberger's proposal to deploy some elements of a spacebased ABM system by the early 1990s. Weinberger warned that the Soviets would be able to test a ground-based laser ABM system within three years. He called for a "phase one" deployment of "ground- and space-based" components of SDI in order to counter this deployment. For the U.S. to do this, it would have to accelerate SDI testing and development. U.S. Senator **Sam** Nunn (D-Ga.), the new chairman of the Senate Armed Services Committee, on February 6 warned in a letter to President Reagan against adopting a "broad interpretation" of the ABM Treaty without first consulting Congress. Nunn **also** maintained that such a move would contravene the intent of the Senate in ratifying the treaty. Wash. Post, Feb. 5, 1987, at A16, col. 1; Wash. Post, Feb. 6, 1987, at A1, col. 6; N.Y. Times, Feb. 7, 1987, at A1, col. 1; **see** N.Y. Times, Aug. 4, 1986, at A17, col. 1. Senator Carl Levin (D-Mi.), who reviewed the classified negotiating record of the treaty, agreed

one fact is clear from the Administration's confusing positions in this regard—the Reagan Administration does consider the ABM Treaty to apply to the “exotic” new technologies associated with SDI. The greater question is how and to what extent the treaty limits SDI.

Commentators have added other rationales in arguing that new ABM technologies are included within the ABM Treaty's limitations. One argument rationalizes that the provision in Agreed Statement D for discussion of “specific limitations” on such systems implies an intention to include them within the general treaty limitations on ABM systems and their components. It avers that if the parties had intended such systems not be limited, they would not have needed to use the word “**specific**.”²⁰⁸ The treaty's Preamble also supports this interpretation by its reliance on successful limitation of ABM systems as a substantial factor leading to “a decrease in the **risk** of outbreak of war involving nuclear **weapons**.”²⁰⁹ The Preamble thus demonstrates the parties' hope that the ABM Treaty would preserve peace into the future and not merely limit ABM systems until new technologies came along which would render the treaty obsolete.²¹⁰

These factors substantiate those arguments that declare that the ABM Treaty applies to the “exotic” technologies contemplated by SDI. Lasers, particle beam weapons, kinetic energy weapons and others, though not specifically mentioned in Article II of the treaty, must be viewed as within the definition of ABM “system” and as such included within the ABM Treaty's limitations.

that a “broad interpretation” of the ABM Treaty is unsupported. Apparently, the general counsel of the Arms Control and Disarmament Agency shares these doubts. N.Y. Times, Feb. 7, 1987, at A1, col. 1. Once again, the **United Kingdom** and other allies expressed opposition to a “broad interpretation”; and Lord Carrington, Secretary General of NATO, urged President Reagan to consult with NATO before making any decision to reinterpret the ABM Treaty. Wash. Post, Feb. 7, 1987, at A1, col. 4; Wash. Post, Feb. 8, 1987, at A30, col. 3. In response to the outcry, President Reagan on February 10 called a special meeting at the White House to **discuss** the issue. Secretary of State Shultz again achieved a **sort** of compromise under which President Reagan indefinitely postponed a decision on whether to adopt a broader view of the ABM Treaty. In this regard, no tests that would go beyond the “restrictive interpretation” of the treaty would be scheduled. Furthermore, consultations were ordered with Congress and the allies in order to decide how to restructure the SDI program to accommodate “a different pattern of testing.” Wash. Post, Feb. 9, 1987, at A1, col. 5; N.Y. Times, Feb. 9, 1987, at A1, col. 4; N.Y. Times, Feb. 11, 1987, at A1, col. 3; Wash. Post, Feb. 11, 1987, at A18, col. 1.

²⁰⁸Smith, *supra* note 35, at 62.

²⁰⁹ABM Treaty, *supra* note 4, preamble.

²¹⁰Smith, *supra* note 35, at 63.

Defining "ABM systems" is not the only problem with the first three articles of the ABM Treaty. The United States and the Soviet Union have charged each other with numerous violations of the ban on territorial defenses contained in Articles I and III. Assistant Secretary of Defense Richard Perle testified before the Senate Armed Services Committee on May 7, 1985, that "of **all** the violations that the President has reported to the Congress in the last **2** years, the single most important violation . . . has been the construction of a large phased array radar near the city of **Krasnoyarsk**."²¹¹ The radar complex in Central Siberia was cited by President Reagan in formal reports to Congress on Soviet arms control violations on February 1²¹² and on December 23, 1985.²¹³ **This** massive "phased-array" radar is important because one of these, backed up by a large computer, can track hundreds of separate attacking missiles, plot their flight paths, and assign interceptor missiles to intercept and destroy them. Phased-array radars **also** are useful in providing early warning of a missile attack.²¹⁴ Its apparent capability to direct ABM defenses for several crucial Soviet offensive ballistic missile sites, thus making it an effective nuclear battle-management center for a territorial defense, is what makes the new radar system most threatening.²¹⁵ The Soviets claim the radars are solely for tracking objects in

"*Soviet Treaty Violations: Hearings Before the Committee on Armed Services, United States Senate*, 99th Cong., 1st Sess. 59 (Feb. 20, May 7, 1985) [hereinafter Senate Hearings].

²¹¹The President's Unclassified Report to the Congress on Soviet Noncompliance with Arms Control Agreements, *reprinted in* Senate Hearings, *supra* note 211, at 14-21 [hereinafter February 1985 Report to Congress].

²¹²**Administration's** Report to the Congress on Soviet Noncompliance with Arms Control Agreements, with letter of transmittal to the Speaker of the House of Representatives and to the President of the Senate, Dec. 23, 1985, *reprinted in* Bureau of Public Affairs, U.S. Dep't of State, Special Rep. No. 136, Soviet Noncompliance With Arms Control Agreements 2 (1985) [hereinafter December 1985 Report to Congress].

²¹³**R.** Jastrow, *supra* note 9, at 124-25.

²¹⁴**See** Special Report, *supra* note 5, at 2; J. Pournelle & D. Ing, *supra* note 24, at 113. President Reagan's December 1985 report to Congress on Soviet noncompliance with **arms** control agreements stated in this regard:

Militarily, the Krasnoyarsk radar violation goes to the heart of the ABM Treaty. Large phased-array radars (LPARs) like that under construction near Krasnoyarsk were recognized during the ABM Treaty negotiations as the critical, long lead-time element of a nationwide ABM defense.

When considered as a part of a Soviet network of new LPARs, the Krasnoyarsk radar has the inherent potential to contribute to ABM radar coverage of a significant portion of the central U.S.S.R.

December 1985 Report to Congress, *supra* note 213, at 2.

space;²¹⁶ but experts outside the Soviet Union counter that, as constructed and oriented, the radar installation could only have been designed as a base for nation-wide missile defense.²¹⁷ The Reagan Administration appears particularly convinced that the Krasnoyarsk radar, coupled with other Soviet ABM-related activities, in the aggregate “suggests” that the Soviet Union is preparing an ABM defense of its national **territory**.²¹⁸

The Soviet Union, beginning in 1978, raised similar questions about American compliance with Article I, citing two “Pave Paws” radars in Massachusetts and California, and complaining about two more of these radars that the United States has been constructing in Georgia and Texas.²¹⁹ The field of coverage was such that the USSR raised the question whether they might be sufficient to provide a base for ABM territorial defense. United States officials insisted, however, that all four “Pave Paws” radars are for space tracking and early warning of submarine-launched ballistic missile attack, which are purposes within the limits of the ABM Treaty.²²⁰ Subsequent Soviet complaints about other U.S. radar sites generally are based on other provisions of the ABM Treaty.²²¹ The USSR however, as if to echo **U.S.** charges, has charged SDI activities as a whole with violating the ABM Treaty’s Article III limitation of ABM defenses to a single area.²²²

C. ARTICLE V AND THE CHARACTERIZATION OF SDI “RESEARCH”

The most publicized and controversial provision of the ABM Treaty is Article V, which goes to the heart of the public debate concerning the extent to which SDI genuinely is a “research” program. Article V, paragraph 1 states: “Each Party undertakes

²¹⁶Marshal Sergei F. Akhromeyev, Chief of the Soviet General Staff, stated in this regard: “The attempt by the American side to continue pressing this ‘accusation’ against the U.S.S.R. means only one thing—an attempt to justify the course taken by the United States itself toward scrapping the ABM treaty.” **N.Y. Times**, June 5, 1985, at 10, col. 4.

²¹⁷Ruhle, *supra* note 175, at 30-31.

²¹⁸February 1985 Report to Congress, *supra* note 212, at 21; December 1985 Report to Congress, *supra* note 213, at 2-5; Nitze, **SDI: The Soviet Program**, Dep’t St. Bull., Sep. 1985, at 40.

²¹⁹T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 40-41. Initial plans for the deployment of the two new radars reportedly resulted in a field of coverage that included almost two-thirds of the continental U.S. The final deployment plan apparently reduces this coverage, but it nevertheless likely **will** remain substantial.

²²⁰*Id.*; ABM Treaty, *supra* note 4, Agreed Statement **F**.

²²¹See *infra* text accompanying notes 254-87.

²²²**N.Y. Times**, June 5, 1985, at 10, col. 4.

not to develop, test, or deploy ABM systems or components which are sea-based, space-based, or mobile land-based."²²³ Research is not prohibited. Paul H. Nitze, Special Advisor to the President and Secretary of State on Arms Control Matters, attributes the lack of constraints upon research to practical factors: the United States and the Soviet Union recognized that it would be impossible to devise effective or verifiable limits or bans on research; also, in the ABM Treaty negotiations neither side desired to restrict their research efforts.²²⁴

The Reagan Administration is extremely careful in its public pronouncements to never give the appearance of deviating from strict adherence to these provisions.²²⁵ As the SDI concept evolved, it was characterized solely as a "research" program.²²⁶ Only if the program proved successful would a subsequent Administration decide whether to develop and deploy an ABM system, and make the decision whether to seek modification of the treaty under its amendment procedures.²²⁷ The Soviet Union publicly agrees with the United States that only research is permitted by Article V, but the Soviets insist that the bar on developing, testing, and deploying space-based ABM systems or components permits only "laboratory research." Moreover, the USSR generally insists in bilateral U.S.-USSR arms control

²²³ABM Treaty, *supra* note 4, art. V.

²²⁴Nitze, *supra* note 162, at 2.

²²⁵*Id.*; Special Report, *supra* note 5; U.S. Dep't of State, *The President's Strategic Defense Initiative*, Gist 2 (March 1985). Kenneth L. Adelman, Director of the U.S. Arms Control and Disarmament Agency, stated the administration policy in this respect: "SDI is a research program only. It does not include development, testing, or deployment inconsistent with the ABM Treaty. President Reagan has made clear that the research efforts will be fully consistent with our international legal obligations, including the ABM Treaty." Adelman, Bureau of Public Affairs, U.S. Dep't of State, Current Policy No. 730, SDI: Setting the Record Straight 2 (1985).

²²⁶*See supra* text accompanying note 28. Following the October 1983 Fletcher report recommendations, President Reagan signed National Security Decision Directive 119 on January 6, 1984, formally implementing the SDI effort. It directed the SDI program manager to conduct a number of major demonstrations of critical missile defense technologies over the next decade, to support a possible deployment decision in the early 1990s. It further directed, however, that SDI be conducted in compliance with the ABM Treaty through the end of President Reagan's second term. T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 15; *see supra* text accompanying note 20. The second report, the "Future Security Strategy Study" directed by Dr. Fred Hoffman, agreed that research was allowed, but warned that development or deployment of new ABM defenses would require modification or renegotiation of the ABM Treaty. *See Jones & Hildreth, Star Wars: Down to Earth, or Gleam in the Sky?* 7 Wash. Q. 3 (1984); *supra* text accompanying note 19.

²²⁷Nitze, *supra* note 162, at 2; U.S. Dep't of Def., *supra* note 28, at 137; Senate Hearings, *supra* note 211, at 50-51.

negotiations that any new arms limitation agreement either be preceded by an understanding along these lines or contain an express provision permitting only "laboratory research" on strategic defense.²²⁸

The Soviet position, above, indicates the chief problem—defining where study and research end and development begins. The treaty fails to define these terms. The USSR naturally claims that it is strictly abiding by the ABM Treaty in this regard, but that Washington rejects the idea of banning development of "strike space weapons."²²⁹ Marshal Sergei Akhromeyev clearly stated the Soviet position:

It is necessary for a ban to embrace every phase of the inception of this new class of arms. This, however, does not deny the right and possibility to conduct *basic research* in outer space. But it is one thing to conduct research and studies in *laboratory conditions* and quite another thing when models and prototypes are created and samples of space arms are tested. This is always followed by deployment of arms. It is precisely such a line, backing it up accordingly with propaganda, that the United States Administration is pursuing as regards the Star Wars program. The USSR views as impermissible

²²⁸L.A. Times, July 14, 1985, at 8; L.A. Times, Nov. 18, 1985, at 5; N.Y. Times, Jul. 22, 1986, at A1, col. 6; *Getting to Zero*, Newsweek, Jan. 27, 1986, at 30. The issue apparently was the chief stumbling block toward reaching an accord at the Reagan-Gorbachev summit on October 11 and 12, 1986, at Reykjavik, Iceland. As part of a proposed agreement that would make drastic cuts in strategic and intermediate-range nuclear forces, and contain nuclear test-ban and verification provisions, the USSR sought a pledge from the US. not to withdraw from the ABM Treaty for 10 years and, during that period, to permit only laboratory research on SDI. Reagan administration officials characterized the Soviet offer with respect to SDI as a "change" to the ABM Treaty that restricted SDI research, development and testing to a greater extent than did the ABM Treaty. As nothing in the treaty confined SDI work to a laboratory, and because the proposed limitation to "laboratory research" for 10 years would effectively kill the SDI program, President Reagan rejected the Soviet offer. Reagan countered with an offer of his own that called for mutual deep nuclear forces cuts and allowed continued research, development and testing for 10 years "under existing provisions of the [ABM] ... treaty." Predictably, that offer too was rejected, and the summit ended in stalemate. *Secretary's News Conference, Reykjavik, Oct. 12, 1986*, Dep't. St. Bull. 9-10 (Dec. 1986); Shultz, *Reykjavik: A Watershed in U.S.—Soviet Relations*, Dep't. St. Bull. 22 (Dec. 1986). See N.Y. Times, Oct. 13, 1986, at A1, col. 1, and A9, col. 1; N.Y. Times, Oct. 14, 1986, at A1, col. 4; N.Y. Times, Oct. 21, 1986, at A1, col. 4. Interestingly, then-Soviet Defense Minister Grechko stated before the Soviet Presidium in 1972 that the ABM Treaty "places no limitations whatsoever on the conducting of research and experimental work directed toward solving the problem of defending the country from a nuclear missile strike." *Quoted in* Adelman, *supra* note 225, at 2.

²²⁹Wash. Post, Oct. 25, 1985, at A24, col. 1.

any out-of-laboratory work connected with the development and testing of models, pilot samples, separate assemblies and components. Everything that is being done for the subsequent designing and production of space strike systems should be banned.²³⁰

The Soviet position is similar to the position that American negotiators apparently took in 1972. During the congressional hearings on the ABM Treaty, Gerard Smith, leader of the U.S. negotiating team, testified:

The prohibitions on development contained in the ABM Treaty would start at that part of the development process where *field testing* is initiated on either a prototype or breadboard model. It was understood by both sides that the prohibition on 'development' applies to activities involved after a component moves from the *laboratory* development and testing stage to the field testing stage.²³¹

Arms Control Impact Statements submitted by President Reagan to Congress apparently accepted this definition. But the American position in current arms control negotiations emphasizes that nothing in the ABM Treaty constrains work on SDI to research in a *laboratory*.²³²

²³⁰*Id.* (emphasis added); see L.A. Times, Oct. 2, 1985 at 7; Pincus, *U.S., Soviets Near Positions for 'Real Negotiations' at Summit*, Wash. Post, Oct. 29, 1985, at A14, col. 1; Wash. Post, Oct. 24, 1985, at A4, col. 1. Recent Soviet arms control proposals in June 1986 add more confusion. Soviet leader Gorbachev proposed that both sides limit SDI-related research to the level of "laboratory tests." Wash. Post, June 17, 1986, at A1, col. 4. The extent to which this is different from "laboratory research" is unclear at this juncture. See Wash. Post, June 19, 1986, at A30, col. 4.

²³¹*Military Implications of the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Committee on Armed Services*, 92d Cong., 2d Sess. 377 (1972), quoted in T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 26 (emphasis added). See Smith, *supra* note 35, at 65 n.70. The Pentagon further distinguished between the initial stages, consisting of basic research, exploratory development, and advanced development up through the point of laboratory testing; and the advanced "field testing" stages beginning with advanced development after laboratory testing, engineering development, and operational systems development. The latter "field testing" stages were deemed prohibited, most likely because of the practical consideration that only at this stage could development be verifiable. T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 26-27; see Christian Science Monitor, Nov. 4, 1985, at 3.

²³²The 1984 Arms Control Impact Statement stated: "The ABM Treaty prohibition on development . . . applies to directed energy technology . . . When such directed energy weapons enter the field testing phase, they become constrained by these ABM Treaty obligations." Quoted in T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 9. See Smith, *supra* note 35, at 65 n.70. A March

Other factors add support to this definition of the dividing line between "research" and "develop." The Russian text uses the word for "create" instead of "development."²³³ By comparing the "ordinary meaning"²³⁴ of the words in the context of the ABM Treaty, one may conclude that "develop" involves the examination of potential ABM technologies at a stage somewhat beyond their study in a laboratory environment.²³⁵ Additionally, Article XII, which provides for monitoring treaty compliance by "national technical means of verification,"²³⁶ supports a dividing line between "research" and "develop" at the point where field testing begins. National technical means include satellite, aircraft, sea, and ground-based surveillance systems. These systems, however, are unable to detect laboratory research. Therefore, for practical reasons, the parties could not have intended to prohibit unverifiable laboratory research.²³⁷ Soviet Premier Mikhail Gorbachev confirmed this to US Senators visiting Moscow in September 1985, stating that any research outside of a laboratory would be considered verifiable, and that verifiable research and development on antimissile weapons, including spacebased systems, is subject to ABM Treaty limits.²³⁸

A series of experiments by both the United States and the USSR have called into question whether both states have exceeded the permissible research allowed by Article V for other-than-fixed land-based ABM systems. The issue is made more

1984 study requested by the President, completed by the Scowcroft Commission, reviewed the administration's proposals for research under SDI and concluded:

[R]esearch permitted by the ABM Treaty is important in order to ascertain the realistic possibility which technologies might offer as well as to guard against the possibility of an ABM breakout by the other side. But the strategic implications of ballistic defense and the criticality of the ABM Treaty to further arms control agreements dictate extreme caution in proceeding to *engineering development* in this sensitive area.

Scowcroft, *President's Commission on Strategic Forces*, March 21, 1984, at 8, quoted in Schlesinger, *supra* note 168, at 11 (emphasis added); see *supra* note 228.

²³³T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 25; Smith, *supra* note 35, at 66.

²³⁴Vienna Convention, *supra* note 91, art. 31.

²³⁵Smith, *supra* note 35, at 66.

²³⁶ABM Treaty, *supra* note 4, art. XII.

²³⁷Smith, *supra* note 35, at 66-67; see T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 25.

²³⁸Wash. Post, Sept. 4, 1985, at A1, col. 2. Senator Sam Nunn (D-Ga.), one of the visiting Senators, called Gorbachev's definition of research "a step in the right direction" because it represented the first time the USSR specified what it meant in objecting to U.S. SDI research. But Nunn cautioned that Gorbachev's definition was too narrow, because it is more limited than planned SDI research and also more limited than the spacebased defense work accomplished by the Soviets.

difficult by the language in Article V that pertains to "ABM systems or components."²³⁹ Consequently, much work proceeds on ABM-related projects that is characterized as "adjuncts," "subcomponents," or "subsystems," which are not limited by the treaty, as opposed to "components," which are limited.²⁴⁰ As might be expected, "components" were not defined by the treaty. The Reagan Administration interprets "components" as including only devices capable of standing on their own as substitutes for the ABM missiles, launchers, or radars mentioned in Article II. "Adjuncts," or other terms implying the same, on the other hand, are merely parts of the independent component.²⁴¹ Presidential science adviser Dr. George Keyworth II explained:

As it's emerging, the Strategic Defense Initiative would move towards a series of progressive *demonstrations* of evolving *subsystems*. Each of these demonstrations would test out a piece of militarily meaningful technology. These would be building blocks from which an eventual system could be designed, but in and of themselves would not constitute a weapons system. Such activity would be fully within the provisions of existing treaty limitations.²⁴²

The problem's practical application is illustrated best by the controversy over the Reagan Administration's characterization of elements of ABM sensors, currently being "demonstrated," as adjuncts to larger ABM components. Demonstrations of the Airborne Optical System (AOS) in particular received much attention.²⁴³ On June 10, 1985, a Minuteman missile launched from Kwajalein Atoll in the Pacific intercepted a dummy warhead fired from California on another missile. The "demonstration" essentially tested two elements of a sensor system that first would spot a target early in flight and trace its trajectory, and then would provide direct guidance information to ground-based interceptors. In an operational system the spotting and tracing functions would be deployed on a satellite. Guidance information would be handled by the AOS, probably mounted in an airplane

²³⁹ABM Treaty, *supra* note 4, art. V.

²⁴⁰Christian Science Monitor, March 27, 1985, at 1 and Nov. 4, 1985, at 3; *Missile Interception of 'Star Wars' Plan Violates ABM Pact*, Long Island Newsday, Aug. 15, 1985, at 68.

²⁴¹T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 28.

²⁴²*Id.* (emphasis added).

²⁴³*Id.* at 29; Christian Science Monitor, Mar. 27, 1985, at 1 and Nov. 4, 1985, at 3; Wash. Post, Jan. 30, 1985, at 1.

capable of remaining airborne for long periods.²⁴⁴ Under the Reagan Administration's interpretation, the two functions when tested separately were not forbidden "tests" of "components," but instead were permitted "demonstrations" of "adjuncts" as neither element acting alone has ABM utility.

Critics counter that this rationale is defective — that in practice, most ABM systems have more than one sensor component acting together to provide battle management. Under the Administration's interpretation, the separate radars in existing ABM systems would be considered as adjuncts to one another, and none could be a component limited by the ABM Treaty.²⁴⁵ Critics add that such a narrow distinction between adjuncts and components also makes verification impossible to achieve, because current verification capabilities could not make such fine distinctions.²⁴⁶ The issue is extremely difficult; but at least in the case of AOS, the Reagan Administration's argument is based too much on hair-splitting semantics to be convincing. And indeed, the **USSR** has protested planned U.S. space-based tracking experiments.²⁴⁷ United States officials similarly criticize the USSR for developing components prohibited by Article V. President Reagan's February and December 1985 reports to Congress on Soviet noncompliance with arms control agreements noted "ambiguous" development of prohibited mobile land-based ABM components that apparently are designed to be rapidly deployable at sites requiring little or no preparation.²⁴⁸

In summary, Article V, paragraph 1, severely limits the development and testing of ABM systems and components, whether

²⁴⁴T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 29; Long Island Newsday, *supra* note 240; Wash. Post, Jan. 30, 1985, at 1. Another SDI sensor project, called Talon Gold, is scheduled for testing in 1988-89. Talon Gold is a spacebased laser targeting mechanism that **will aim** a spacebased laser weapon at incoming ballistic missiles. Plans call for it to be tested aboard the space shuttle. *Talon Gold Launch Slips*, Aviation Week & Space Tech., Aug. 20, 1984; Christian Science Monitor, Aug. 16, 1984, at 18. For an account of other scheduled tests, see N.Y. Times, Sep. 5, 1986, at A13, col. 1.

²⁴⁵T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 29.

²⁴⁶*Id.* at 29-30.

²⁴⁷Wash. Post, Jan. 30, 1985, A1, col. 5 and A16, col. 4. The USSR, in its June 1986 arms-reduction offer, expressed the desire to define components and subcomponents in order to close what they consider a loophole used by the United States to justify SDI testing. Wash. Post, June 14, 1986, at A20, col. 2.

²⁴⁸February 1985 Report to Congress, *supra* note 212, at 21; December 1985 Report to Congress, *supra* note 213, at 4; U.S. Dep't of Defense, *supra* note 28, at 48. The Soviets are testing a "modular radar" that is easily transportable and can be disassembled and reassembled in a period of months. Another ABM radar being developed is housed in a van-sized container. T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 57-58.

they are based on technologies existing in 1972 or on new or "exotic" ABM technologies. But excluded from Article V are fixed land-based ABM systems and components, for which development and testing is permitted and in fact is proceeding at a rapid **pace**.²⁴⁹ **Deployment** of a space-based ABM system or its components is prohibited. With respect to fixed land-based ABM systems or components, deployment is limited by the restrictions provided by Article III acting in conjunction with Agreed Statement D.²⁵⁰

Finally, Article V, paragraph 2, prohibits either side from developing, testing, or deploying ABM systems that allow launching of more than one ABM interceptor missile at a time from each launcher, or automatic, semi-automatic, or similar systems for rapid reload of ABM launchers.²⁵¹ Agreed Statement E, which pertains to that paragraph, places identical prohibitions on multiple independently guided warheads for ABM interceptor missiles.²⁵² Paragraph 2 has not been a major point of contention, but President Reagan's December 1985 report to Congress on Soviet arms control noncompliance did note that "the U.S.S.R.'s action with respect to the rapid reload of ABM launchers constitute an ambiguous situation as concerns its legal obligations under the ABM Treaty."²⁵³

D. ARTICLE VI AND "ABM CAPABILITIES"

Article VI of the ABM Treaty is designed to enhance the effectiveness of the previously stated limitations by ensuring that missiles, launchers, or radars that are developed and deployed for non-ABM purposes will not also have ABM capabilities. Toward that end, it prohibits the United States and the USSR from

²⁴⁹The Washington Post reported in January 1985 that the Army is progressing rapidly with the ground-based leg of SDI, and that parts of the system could be deployable prior to 1990. Named Army projects centered on rocket-launched sensing devices, the airborne optical system, a mobile radar system, and new interceptor missiles with nonnuclear kill mechanisms. Wash. Post, Jan. 30, 1985, at A1, col. 5. The USSR also is progressing in fixed land-based ABM defenses. U.S. Dep't of Defense, *supra* note 28, at 44, 48.

²⁵⁰See *supra* text accompanying notes 189-91.

²⁵¹ABM Treaty, *supra* note 4, art. V.

²⁵²*Id.* Agreed Statement E.

²⁵³December 1985 Report to Congress, *supra* note 213, at 5. Some indication exists that the Soviets conducted a test in which two short-range interceptors deployed as part of Moscow's ABM system were fired from a single launcher in an interval of two hours. T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 57; J. Pournelle & D. Ing, *supra* note 24, at 114.

testing these missiles, launchers, or radars “in an ABM mode.”²⁵⁴ Testing in an ABM mode was not defined, but, in 1978, the United States and the USSR reached an Agreed Statement elaborating upon the term.²⁵⁵ Although classified, the 1978 Agreed Statement presumably is similar to the U.S. Unilateral Statement attached to the treaty that indicates that the United States would regard a missile or radar to be “tested in an ABM mode” if

[A]n interceptor missile is flight tested against a target vehicle which has a flight trajectory with characteristics of a strategic ballistic missile flight trajectory, or is flight tested in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range, or is flight tested to an altitude inconsistent with interception of targets against which air defenses are deployed. . . .²⁵⁶

President Reagan’s reports to Congress concerning Soviet arms control noncompliance pointed to several potential Soviet violations of Article VI.²⁵⁷ Much concern was expressed about the Soviet Union’s program to upgrade the capabilities of its surface to air missile (SAM) system. The reports also stressed that the Soviets “probably” conducted tests of SAM “in an ABM mode,” due to the number of incidents of concurrent operation of ABM and SAM components. Further, they charged that the Soviets conducted tests of air defense radars in “ABM-related activities.”²⁵⁸ The President’s reports indicate perhaps the most difficult issue concerning Article VI — that is, how to treat “gray area” systems that are designed to perform non-ABM functions, but that also have some effective ABM capabilities. The chief threats to Article VI in this respect are posed by anti-satellite (ASAT) weapons, anti-tactical ballistic missiles (ATBM), and large phased-array radars.

“ABM Treaty, art. VI. It provides:

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by the Treaty, each Party undertakes:

(a) not to give missiles, launchers, or radars, other than ABM interceptors missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode. . . .

²⁵⁴T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 24.

²⁵⁵*Id.*; ABM Treaty, *supra* note 4, Unilateral Statement B.

²⁵⁶“February 1985 Report to Congress, *supra* note 212, at 21; December 1985 Report to Congress, *supra* note 213, at 4-5.

²⁵⁸*Id.*; U.S. Dep’t of Defense, *supra* note 28, at 22-23.

Anti-satellite systems and components are not mentioned in the ABM Treaty and, therefore, are not *per se* prohibited. However, ASAT weapons violate Article VI if they are given ABM capabilities. The technologies for destroying satellites and ballistic missiles overlap considerably; therefore, many elements needed for an ABM system may be tested or even deployed under the guise of ASAT tests.²⁵⁹ The USSR admits that it conducts laser experiments against orbiting satellites from huge laser test facilities at Sary Shagan, in central Asia, and that the laser facilities could easily be upgraded to achieve space weapons capability.²⁶⁰ Yet the Soviets contend that similar experiments conducted by the United States violate the ABM Treaty because they are being conducted for a different purpose — that is, as a guise for SDI.²⁶¹ The Reagan Administration is not helped in this regard by the fact that many influential administration critics agree with the Soviets on the latter point.²⁶² Wherever the dividing line between ASAT and ABM technology lies, future improvements in ASAT technology promise to make this issue more prominent.

Similar problems exist with respect to anti-tactical ballistic missiles. These are weapons that can destroy medium and intermediate range ballistic missiles.²⁶³ The problem is that, as

²⁵⁹T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 33-34; Glaser, *Do We Want the Missile Defenses We Can Build?* 10 Int'l Security 56 (1985); Smith, *supra* note 35, at 68; Christian Science Monitor, Aug. 16, 1984, at 18. For an overview of ASAT technology, see R. Jastrow, *supra* note 9, at 60-66.

²⁶⁰L.A. Times, Nov. 18, 1985, at 5. Robert Jastrow describes a "killer-satellite" designed to destroy other satellites in orbit, being tested by the USSR. R. Jastrow, *supra* note 9, at 60-62.

²⁶¹R. Jastrow, *supra* note 9, at 60-62; L.A. Times, Nov. 18, 1985, at 5. United States ASAT development concentrates on a rocket-propelled "smart bullet" mounted on a modified F-15 fighter. The airplane flies to an altitude of 50,000 feet and fires the rocket at the orbiting satellite. The rocket uses heat-sensitive homing devices to intercept the satellite and destroys it by the force of impact. R. Jastrow, *supra* note 9, at 63. The United States reportedly plans to test spacebased weapons and sensors that are part of SDI in the early 1990s against satellite targets that will simulate ballistic missile characteristics. T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 34. The tests clearly would contradict Unilateral Statement B and probably violate Article VI.

²⁶²Herbert Scoville, Jr., a former assistant director of the CIA and of the Arms Control and Disarmament Agency, and now the president of the Arms Control Association, stated: "The name under which different systems are tested—ASAT or ABM—amounts to a mere labeling game. Thus, the administration hopes to avoid adherence to the ABM Treaty." He added that, as a result, "[e]ventually, the ABM Treaty would be eroded in substance without formal abrogation by either side." Christian Science Monitor, Aug. 16, 1984, at 18.

²⁶³T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 34.

ATBM technology improves, it easily gains an ABM capability.²⁶⁴ Also, verification that systems are solely ATBM capable is extremely difficult.²⁶⁵ The distinctions become even more blurred by the fact that many current ATBM programs in the United States are subsumed under umbrella SDI programs.²⁶⁶ Interestingly, one side-effect of this process is that the NATO allies become more interested in SDI when mention is made of ATBM spin-offs from SDI that might assist them in protecting Western Europe from Soviet short and medium range missiles aimed at European territory.²⁶⁷ The lure of this aspect of SDI has not gone unnoticed by some SDI advocates who desire to strengthen public and alliance support for SDI by bringing NATO allies into the project.²⁶⁸

The same problems exist with respect to large phased-array radars, where technologies for conventional air defense and ballistic missile defense overlap. The United States accuses the USSR of conducting tests that involve air defense radars in ABM-related activities;²⁶⁹ but, probably because of the difficulty in verification, as well as its own likely practices in this regard, the United States is not overly vehement in pursuing the matter.

The issues presented by phased-array radars primarily are argued under Article VI, subparagraph (b), by which the parties undertook "not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations *along the*

²⁶⁴*Id.* at 35-37; Glaser, *supra* note 259, at 55-56. The USSR is deploying the SA-10 SAM system and flight-testing another, the mobile SA-X-12. Both may have the potential to intercept some U.S. ballistic missiles. The SA-X-12 is classified as a tactical SAM and anti-tactical ballistic missile (ATBM). U.S. Dep't of Defense, *supra* note 28, at 48.

²⁶⁵U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 64.

²⁶⁶T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 36-39.

²⁶⁷*See* Wash. Post, Sept. 5, 1985, at A1, col. 6; Wash. Post, Oct. 19, 1985, at A14, col. 1.

²⁶⁸"Representative Duncan L. Hunter (R-Calif.) in November 1985 conferred with European government officials in Paris, Brussels, Copenhagen, Bonn, and London about "a NATO effort with the United States providing information and technology" that would involve "the Europeans building it and the Europeans paying for it." Hunter's aim was to build allied support for SDI by widening the protective shield to include a European defense capable of destroying Soviet medium-range nuclear SS-20 missiles as well as shorter range nerve gas missiles. The U.S. Army also expressed interest in a European ATBM. Wash. Post, Oct. 19, 1985, at A14, col. 1. Senator Dan Quayle (R-Ind.) offered an amendment to the FY87 defense authorization bill asking \$50 million for "cooperative development" of a European ATBM. The "bonus effect" to SDI from such a project has not gone unnoticed by administration officials. Wash. Post, Apr. 25, 1986, at A9, col. 1.

²⁶⁹*See supra* note 258.

periphery of its national territory and oriented *outward*.”²⁷⁰ BY restricting radars to an outward orientation along the States’ peripheries, the ABM Treaty drafters intended thereby to ensure that radars did not contribute to an effective ABM defense of points in the interior in violation of Articles I and III.²⁷¹ The treaty does permit deployment, without regard to location or orientation, of large phased-array radars for tracking objects in outer space or for use as “national technical means of verification” of arms control compliance.²⁷²

The Krasnoyarsk radar described earlier²⁷³ is the focal point in the application of Article VI, subparagraph (b). President Reagan’s reports to Congress on Soviet noncompliance with arms control agreements state that “in its associated siting, orientation, and capability, it is prohibited by this Treaty.”²⁷⁴ The USSR, in response, denies that the radar violates the ABM Treaty,²⁷⁵ but it has offered to halt construction of the radar if the United States halts modernization of two of its radar sites that the USSR contends violate the treaty.²⁷⁶ The two U.S. radar sites are fixed-array radar stations at Thule Air Base in northern Greenland and at Fylingdales Moor in northern England; they constitute part of the American ballistic missile early warning system, built in the 1960s, that would detect Soviet missiles launched over the North Pole toward the United States. The United States currently is upgrading the radars by converting them to phased-array, which have increased capabilities because of the expanded scope of “vision.”²⁷⁷ The Soviets apparently feel that the upgrading is such that it amounts to deployment of a new early warning system outside the periphery of the national

²⁷⁰ABM Treaty, *supra* note 4, art. VI (emphasis added).

²⁷¹U.S. Arms Control and Disarmament Agency, *supra* note 63, at 137-38.

²⁷²ABM Treaty, *supra* note 4, Agreed Statement F.

²⁷³See R. Jastrow, *supra* note 9, at 125; *supra* text accompanying notes 211-14.

²⁷⁴February 1985 Report to Congress, *supra* note 212, at 20-21; December 1985 Report to Congress, *supra* note 213, at 4. The Department of Defense adds that the USSR has the world’s most extensive early warning system, which provides about 30 minutes warning of a U.S. attack. Its detection and tracking radars are located at six positions on the periphery of the USSR. The Krasnoyarsk radar under construction in central Siberia also will provide early warning and target tracking. U.S. Dep’t of Defense, *supra* note 28, at 45-46; see also T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 52-54.

²⁷⁵Soviet Lt. Gen. Vladimir Starodubov, responding to President Reagan’s December 1985 report to Congress on Soviet noncompliance with arms control agreements, stated at a press conference in Moscow that “[t]he radar under construction is for tracking space objects” and added that it “is not yet developed and is only in the process of construction.” *Quoted* in Wash. Post, Dec. 30, 1985, at A18, col. 1.

²⁷⁶Wash. Post, Oct. 30, 1985, at A1, col. 4.

²⁷⁷*Id.*; T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 40-41.

territory in violation of Article VI.²⁷⁸ Further, if the upgrade increases the radars' capabilities to such an extent that they could provide some ABM battle management capabilities, then the Thule and Fylingdales Moor radars would be inconsistent with Article IX of the treaty "not to transfer to other States, and *not to deploy outside its national territory*, ABM systems or their components limited by this treaty."²⁷⁹

The Reagan Administration rejected the Soviet proposal to exchange the Krasnoyarsk project for the Thule and Fylingdales Moor radar upgrade projects. Defense Secretary Caspar W. Weinberger told the Senate Foreign Relations Committee that the Soviet offer equated a Russian project prohibited by the ABM Treaty with American modernization of existing radar sites that the treaty permits.²⁸⁰ Secretary Weinberger is correct in interpreting the treaty if the upgrading is simply a modernization of existing early warning sites. Presumably, technical improvements of an early warning system that increase the capabilities so that it also has "ABM capabilities" would exceed the permissible limits of "modernization." The ABM Treaty limits only the deployment of radars in the "future"—by implication Article VI allows the United States and the USSR to have early warning radars located outside the national territory's periphery if the radars existed when the treaty was signed in 1972.²⁸¹ Indeed, Ambassador Gerard Smith's testimony before the Senate ratification hearings confirms this.²⁸² No treaty provision prohibits modernization of permitted early warning systems. Article VII, in fact, permits "modernization and replacement of ABM systems or their components . . ." unless specifically prohibited elsewhere in the treaty.²⁸³ Whether Article VII even applies to early warning radars is questionable because a careful reading of the Agreed Statements and U.S. Unilateral Statements appear to classify radars as having "ABM potential," as opposed to having only early warning capabilities, according to factors such as radar location, orientation, and emitted power to antenna area.²⁸⁴ Nevertheless, whether necessary or not, the Reagan Administra-

²⁷⁸Wash. Post, Dec. 30, 1985, at A18, col. 1.

²⁷⁹"ABM Treaty, *supra* note 4, art. IX (emphasis added); see T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 41; Wash. Post, Oct. 30, 1985, at A1, col. 4.

²⁸⁰Wash. Post, Nov. 1, 1985, at A1, col. 5.

²⁸¹"ABM Treaty, *supra* note 4, art. VI.

²⁸²T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 41.

²⁸³ABM Treaty, *supra* note 4, art. VII.

²⁸⁴See *id.*, art. VI; Agreed Statement A; Agreed Statement B; Unilateral Statement D.

tion uses Article VII as the basis for its position that, because the upgraded, phased-array radars are in the same location as previously existing radars, they are a permitted "modernization."²⁸⁵

In any event, Article V prohibits modernization for spaced-based ABM systems or **components**.²⁸⁶ However, the parties to the ABM Treaty may pursue modernization of ABM systems or components—in effect land-based defenses—that otherwise are permitted by the treaty.²⁸⁷

E. ARTICLE N AND "TEST RANGES")

Article IV of the ABM Treaty permits the development and testing of ABM systems and components at mutually agreed upon test ranges.²⁸⁸ Common Understanding B identified "current" U.S. ABM test ranges at White Sands, New Mexico, and at Kwajalein Atoll, and the current Soviet test range near Sary Shagan, Kazakhstan. It further allowed nonphased-array radars used for range safety or instrumentation purposes to be located outside of ABM test ranges. No ABM components would be located at any other test ranges without prior agreement of the parties.²⁸⁹ A 1978 Agreed Statement further defines test ranges for ABMs, identifies current ranges, and sets forth procedures for notifying the other party when a new test range is established.²⁹⁰ SDI critics contend that a test range established at Shemya Island in the Aleutians may be used to test ABM systems or components. As the U.S. administration has not sought agreement with the USSR that the island now be considered an ABM test range, **U.S.** tests there may violate Article IV, Common Understanding **B**, and the 1978 Agreed **Statement**.²⁹¹ The **USSR** recently publicized the test range issue when it charged that a nuclear device exploded beneath the Nevada desert in December

²⁸⁵T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 41. John B. Rhineland, legal adviser to the U.S. ABM Treaty negotiating team, has stated that the treaty does not clearly permit the modernization of the two U.S. radars. Wash. Post, Oct. 30, 1985, at A1, col. 4 and A8, col. 2.

²⁸⁶*See supra* text accompanying note 223.

²⁸⁷*See* Wash. Post, Jan. 30, 1985, at A1, col. 5. General Daniel Graham and other SDI advocates urge utilization of the 30mm. GAU-8 mini-cannon as an element of a point-defense system that could be deployed immediately. This "now-tech" weapon is the chief armament of the U.S. A-10 anti-tank attack aircraft. The shock of rapid-fire target saturation would disintegrate the object. D. Graham, *supra* note 45, at 270; J. Pournelle & D. Ing, *supra* note 24, at 43-45.

²⁸⁸ABM Treaty, *supra* note 4, art. IV.

²⁸⁹*Id.* at Agreed Statement B.

²⁹⁰T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 7, 44.

²⁹¹*Id.* at 43-44.

1985 as part of an x-ray laser test violated ABM Treaty provisions because it did not occur at a site designated for tests of defensive weapons.²⁹² The United States denied that the test violated the ABM Treaty.²⁹³ The United States, on the other hand, also has charged the USSR with Article IV violations in President Reagan's reports to Congress on Soviet noncompliance with arms control agreements.²⁹⁴

F. LEGAL OPTIONS FOR RESPONDING TO TREATY NONCOMPLIANCE

The discussion above identifies many areas where violations of the ABM Treaty, actual or potential, occur. The ABM Treaty recognizes certain remedies that are available to an "aggrieved" party when the other party is not complying with the treaty terms. Because the thought processes of Soviet leaders for responding to what the USSR perceives to be U.S. noncompliance generally are unavailable, only the legal options publicly identified by U.S. officials for responding to Soviet treaty noncompliance are discussed here. The legal responses provide three basic options: work within a Standing Consultative Commission to attempt to obtain a solution within the confines of the ABM Treaty, per Article XIII; amend the treaty, in accordance with Article XIV; or abrogate the treaty, in accordance with Article XV.

The Geneva-based Standing Consultative Commission was established as the forum for discussing future ABM Treaty issues.²⁹⁵ Its advocates see it as "the main avenue for resolving compliance issues in order to preserve and strengthen the Treaty,"²⁹⁶ and they chide the Reagan Administration for not using the Commission to resolve SDI issues.²⁹⁷ The Administration, while telling the Soviets that the U.S. goal is to reinforce, and not change, the ABM Treaty,²⁹⁸ has elected to avoid the Commission for resolving SDI matters. Secretary of Defense

²⁹²Wash. Post, Dec. 30, 1985, at A18, col. 1; L.A. Times, Dec. 29, 1985, at 1 and Dec. 30, 1985, at 9. The \$30 million test, aptly code-named Goldstone, and conducted by the Energy Department, took place 1,800 feet below the desert. The blast was equivalent to between 20,000 and 150,000 tons of TNT, and was the fifth of a series of x-ray laser tests since 1980.

²⁹³L.A. Times, Dec. 30, 1985, at 9.

²⁹⁴@February 1985 Report to Congress, *supra* note 212, at 21; December 1985 Report to Congress, *supra* note 213, at 4-5.

²⁹⁵ABM Treaty, *supra* note 4, art. XIII.

²⁹⁶T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 66.

²⁹⁷Boston Globe, Nov. 22, 1985, at 10.

²⁹⁸Wall St. J., Sept. 26, 1985, at 35.

Caspar W. Weinberger and Assistant Secretary of Defense Richard Perle are contemptuous of the Commission and would like to see it abolished.²⁹⁹ The problem, in their view, is that the Commission is powerless to deal with such important issues as the scope of treaty limitations on U.S. or **USSR** ABM developments. The Commission can deal with small technical issues, but the ABM issue has become so broadly important that it must be approached instead on a high political plain.³⁰⁰

Amending the treaty under Article XIV is more palatable to Reagan Administration officials than resorting to the Commission. Paul H. Nitze, special advisor to the president on arms control, states that the drafters of the ABM Treaty "envisaged a living accord—that is, one that would make allowance for and adapt to future circumstances"—and that, therefore, the parties incorporated provisions allowing for its modification.³⁰¹ American officials always acknowledged that, at some point, SDI will progress to a stage where the next step could not be taken without amending or scrapping the ABM Treaty.³⁰² Lieutenant

²⁹⁹Wash. Post, Nov. 18, 1985, at A1, col. 4. Richard Perle, in a Pentagon report to the President, described the Commission as "an Orwellian memory-hole into which our concerns have been dumped like yesterday's trash." Wash. Post, Dec. 19, 1985, at A35, col. 1.

³⁰⁰Wash. Post, Dec. 19, 1985, at A35, col. 1. Assistant Secretary Perle, testifying about Soviet treaty violations before the Senate Armed Services Committee on February 20, 1985, stated: "The SCC is basically a technical forum to deal with ambiguities. The problem however is violation. These can only be resolved at the political level." Perle further testified before that body on May 7, 1985: "It is simply a forum where American technicians and Soviet technicians are able to talk to one another. Neither side, in my judgment, has significant authority to alter the practices of its national authorities, and because there exist no clear incentives to compliance, I think it would be unreasonable to expect a forum like the Standing Consultative Commission to produce compliance where there is a pattern of noncompliance." Senate Armed Services Committee, *supra* note 211, at 10, 61. Paul H. Nitze is more generous in his view of the Commission. In his opinion, it should negotiate any amendments that either side may propose under Article XIV, as well as consider changes in the strategic situation that have a bearing on the treaty, such as the impact of new defense technologies on the basic technological assumptions on which the treaty was based. Nitze, *supra* note 162, at 2.

³⁰¹Nitze, *supra* note 162, at 2-3; see Senate Hearings, *supra* note 211, at 104-05.

³⁰²The official state Department line is:

If and when our research criteria are met, and following close consultation with our allies, we intend to consult and negotiate, as appropriate, with the Soviets pursuant to the terms of the ABM Treaty, which provide for such consultations, on how deterrence could be enhanced through a greater reliance by both sides on new defensive systems. . . .

If, at some future time, the United States, in close consultation with its allies, decides to proceed with deployment of defensive systems, we intend to utilize mechanisms for U.S.-Soviet consultations provided for in the ABM Treaty.

General James Abrahamson, Director of the Strategic Defense Initiative Organization, told a Senate Armed Services subcommittee: "There clearly will come a time [in the 1990s] when we enter the development phase and . . . require much more direct testing [of components of a defensive system] that we will have to have a modified [ABM] treaty in some way in order to proceed. . . ." ³⁰³ Former National Security Adviser and Secretary of State Henry Kissinger, former Defense Secretary James R. Schlesinger, and others have commented that an ABM Treaty modification could be part of a greater bargaining process involving U.S.-Soviet agreement to reduce certain offensive missiles and to phase in a limited ABM defense. ³⁰⁴ The USSR, however, claims that it would oppose any U.S. effort to amend the ABM Treaty in order to accommodate SDI. ³⁰⁵ The Soviet claim appears to be realistic in view of the uncertain state of current SDI technology and the extent to which the treaty would have to be changed to accommodate a vastly broadened concept of defense in the place of the current very limited permissible defense. If new arms

Senate Report, *supra* note 5, at 5; Senate Hearings, *supra* note 211, at 104-05; *see* Christian Science Monitor, Nov. 4, 1985, at 3; N.Y. Times, June 5, 1985, at A10, col. 1.

³⁰³ *Reported in* Wash. Post, Nov. 18, 1985, at A1, col. 3.

³⁰⁴ *Kissinger, Let's Not Zap Our 'Star Wars' Potential*, N.Y. Post, Sept. 9, 1985, at 23; Krauthammer, *Will Star Wars Kill Arms Control?*, New Republic, Jan. 21, 1985, at 12; Christian Science Monitor, Nov. 4, 1985, at 3. Henry Kissinger observed:

The Administration has an opportunity to bring about a historic change in strategic relationships and vastly reduce the threat of a nuclear apocalypse. To safeguard its opportunity the Administration must abandon its distinction between research and deployment. It should state explicitly that it will not accept a ban on missile defenses but that it will negotiate the scope and nature of strategic defense simultaneously and in relation to agreed levels of offensive forces. The United States should put forward a policy that **links** a dramatic reduction of offensive capabilities to a limited build-up of defensive forces.

Kissinger stated that **as** part of this policy:

The ABM Treaty would be modified as provided in its review procedures. . . . Such an agreement would dramatically reverse the accumulation of nuclear warheads. The level of defense would be geared to—and therefore limited by—a sharply declining level of offense. . . . If only an all-out attack can penetrate defenses and if a strategic defense makes it uncertain what weapons will get through, rational incentives for nuclear war will diminish.

³⁰⁵ *Marshal Sergei F. Akhromeyev*, Chief of the Soviet General Staff, stated in Pravda: "The Soviet Union will naturally not agree to turn the treaty on the limitation of ABM systems into a cover-up for the United States policy **aimed** at an arms race in space-based antiballistic missile systems." N.Y. Times, June 5, 1985, at 10.

control rules in this area are to be adopted, only an entirely new ABM Treaty is practical.

Critics of **SDI** often assert that the United States will have to break the ABM Treaty if it proceeds with an ABM defense. **This** implies that international law will be broken. But Article XV provides each state a legal means for terminating the ABM Treaty "if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests."³⁰⁶ United States negotiators attempted to better define America's "supreme interests" in Unilateral Statement A, which states in pertinent part: "If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty."³⁰⁷ Article XV further provided that a party could withdraw following six months prior notice to the other party.³⁰⁸

Many critics of the ABM Treaty assert the failure to achieve progress in offensive strategic arms limitation agreements and the Soviet violations as bases for withdrawing under the theory that

³⁰⁶ ABM Treaty, *supra* note 4, art. XV.

³⁰⁷ *Id.* at Unilateral Statement A. Whether the unilateral statements are actual parts of the treaty is an interesting issue. The Vienna Convention on the Law of Treaties defines "reservation" as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention, *supra* note 91, art. 19. If Unilateral Statement A can qualify as a reservation, it may be considered an integral part of the ABM Treaty; as the Soviet Union apparently has not objected to the unilateral statement, it may be considered to have accepted it. Vienna Convention, *supra* note 91, art. 20; *see* I. Brownlie, *supra* note 91, at 607-08. It is doubtful, though, that the ABM Treaty unilateral statements qualify as reservations, since they were made during the negotiations of the treaty and not at the time of "signing, ratifying, accepting, approving or acceding" to the treaty. *See* U.S. Arms Control and Disarmament Agency, *supra* note 63, at 146. Also, Unilateral Statement A does not attempt "to exclude or to modify the legal effect" of provisions of the treaty, but merely states one instance where the United States definitely could consider its supreme interest jeopardized. Unilateral Statement A thus assists in defining "supreme interests" without attempting to restrict or modify the term's legal effect in any way.

³⁰⁸ ABM Treaty, *supra* note 4, art. XV. The June 1986 Soviet arms-reduction proposal asks the United States to adhere to the ABM Treaty for another fifteen or twenty years and thereby limit progress in missile defense systems in exchange for mutual reductions in strategic offensive arms. *See* Wash. Post, June 13, 1986, at A1, col. 2; Wash. Post, June 18, 1986, at A30, col. 4. And the Soviet proposal at Reykjavik, Iceland, in October 1986, sought a pledge from the United States not to withdraw from the treaty for 10 years. *See supra* note 228.

U.S. "supreme interests" are jeopardized.³⁰⁹ The Reagan Administration clearly indicates that it regards the assumptions on which the ABM Treaty was based—that limits on defensive systems inevitably would lead to limits on offensive systems—have not proven true. President Reagan has stated that the failed presumptions include an assumption that SALT I and the ABM Treaty would lead to stability and eventual reduction in strategic arsenals; an assumption that the treaties contemplated parity in offensive weapons systems, when actually the USSR continued to race for superiority; an assumption that MAD, implicit in the treaties, is in the common interest of the United States and **USSR**; and an assumption that SALT I and the ABM Treaty would be complied with.³¹⁰ Contributing to the failure of these basic assumptions is the development of new technologies that today offer the possibility of ABM defenses that could not have been conceived in 1972 and the erosion of the assured survivability of U.S. deterrent forces as the result of Soviet deployment of large numbers of accurate MIRVed warheads.³¹¹

The basic assumption that Soviets would comply with the ABM Treaty proved invalid, principally because of the construction of the Krasnoyarsk phased-array radar. But it also proved invalid with the apparent testing and development of mobile ABM

³⁰⁹D. Graham, *supra* note 45, at 314; J. Pournelle & D. Ing, *supra* note 24, at 61, 113-15.

³¹⁰L.A. Times, July 14, 1985, at 8; see Special Report, *supra* note 5, at 1-2. Kenneth Adelman calls the failure of these basic assumptions "the main threats to that treaty," stating:

The ABM Treaty closely **links** limitations on strategic offensive and defensive systems. It embodies the obligation of both parties to negotiations on strategic offensive arms. Before entering into the ABM Treaty, the US fully understood that long-term constraints on strategic defensive systems would not be in our interest unless accompanied by real constraints on strategic offensive systems.

Adelman, *The Impact of Space on Arms Control*, Def. Sci., Apr.-May 1985, at 43. Assistant Secretary of Defense Richard Perle elaborated concerning the assumption that the ABM Treaty would curb the arms race:

Since 1972 the Soviet Union has continued to build up its strategic nuclear forces. In 1972 when the SALT I Treaty was signed, the Soviet Union had approximately 2040 ballistic missile warheads. In 1984 the Soviet total had risen to over 8,000. Since the mid and late 1970's there has been serious concern in the United States that the Soviet Union would effectively be able to eliminate a significant portion of the US. ICBM force.

Senate Hearings, *supra* note 211, at 50.

³¹¹See Special Report, *supra* note 5, at 2; *supra* text accompanying notes 8-11, 169; see also Jones & Hildreth, *supra* note 226, at 1-2; Kupperman, *Using SDI to Reshape Soviet Strategic Behavior*, Wash. Q., Summer 1985, at 77-80.

components, the concurrent testing of air defense and ABM components, development of an air defense system with ABM capabilities, and the rapid reload capability of ABM launchers—all mentioned earlier.³¹² American decision-makers believe that these Soviet actions violate the language and intent of the ABM Treaty and, therefore, provide the legal justification for a U.S. withdrawal should it so desire.³¹³

The principles in the law of treaties concerning “fundamental change of circumstances” support the idea that the failed basic assumptions provide the legal justification for a U.S. withdrawal from the ABM Treaty. The principle of *rebus sic stantibus*, expressed in Article 62 of the Vienna Convention on the Law of Treaties, permits a Party to withdraw from a treaty when an unforeseen fundamental change in circumstances occurs after the conclusion of the treaty, those circumstances “constituted an essential basis of the consent of the parties to be bound,” and the change radically transforms the remaining treaty obligations.³¹⁴ With respect to the ABM Treaty, the unexpected failure to achieve progress in offensive strategic arms limitation³¹⁵ may be a fundamental change, because progress in this respect explicitly was cited by the treaty and by statements of the parties as an essential premise for the agreement.³¹⁶ Further, the goal of the ABM limitations—that is, an eventual reduction in offensive missiles—was frustrated by the failure to achieve progress in offensive strategic arms limitation.³¹⁷

³¹²December 1985 Report to Congress, *supra* note 213, at 2-5; Special Report, *supra* note 5, at 2; *see supra* text accompanying notes 211, 248, 253, 258. Kenneth Adelman singles out the Krasnoyarsk radar as the “first and foremost” threat to the treaty. Adelman, *supra* note 225, at 2.

³¹³Assistant Secretary of Defense Richard Perle, in response to Senate Armed Services Committee questions about U.S. response options to Soviet arms control violations, stated that the President directed the Defense Department to identify specific actions that the United States could take as “proportionate responses.” In this regard, he stated: “The United States would not violate a treaty with the USSR in order to deny them the benefit of their treaty violations. However, international law recognizes that if a party to an agreement violates it, the injured party may terminate or suspend the agreement in whole or in part.” Senate Hearings, *supra* note 211, at 102-03; *see* Gray, *Moscow Is Cheating*, 56 Foreign Pol’y 148 (1984).

³¹⁴Vienna Convention, *supra* note 91, art. 62; *see* I. Brownlie, *supra* note 91, at 616-18.

³¹⁵*See* statement of Assistant Secretary of Defense Richard Perle, *supra* note 310.

³¹⁶ABM Treaty, *supra* note 4, preamble; *see supra* note 307.

³¹⁷ABM Treaty, *supra* note 4, preamble; statement of Richard Perle, *supra* note 310.

The Soviet violations cited by President Reagan, however, are not a fundamental change of circumstances. Treaty law regards this as a material breach of obligations. The wronged party under this remedy still may obtain the same result as with *rebus sic stantibus*, as termination of the treaty is an available sanction for responding to the breach. The fact that the ABM Treaty does not mention material breach does not foreclose its use as a sanction by the wronged party.³¹⁸

Administration officials publicly state that the United States has no present intention of renouncing the ABM Treaty.³¹⁹ On the other hand, these officials recognize that the failed basic assumptions "have resulted in significant erosion of the Treaty."³²⁰ The situation, according to Secretary of Defense Caspar W. Weinberger, calls for a vigorous U.S. response³²¹ to what many Defense Department officials and defense analysts term a dangerous, imminent "Soviet ABM breakout."³²² The response, according to some Reagan Administration officials, may be an anticipatory "U.S. ABM breakout," presumably under the theory that Soviet violations have effectively abrogated the ABM Treaty so that the United States may consider itself free of its

³¹⁸Vienna Convention, *supra* note 91, art. 60. It states:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

....

3. A material breach of a treaty ... consists in: (a) a repudiation of the treaty not sanctioned ... or (b) the violation of a provision *essential to the accomplishment of the object or purpose* of the treaty.

See I. Brownlie, *supra* note 91, at 615-16 (emphasis added).

³¹⁹Senate Hearings, *supra* note 211, at 71.

³²⁰*Id.* at 103.

³²¹Wash. Post, Nov. 18, 1985, at A1, col. 4.

³²²The argument is that the USSR has invested heavily in air defense systems that quickly could be upgraded to perform ABM missions. This possibility of unilateral Soviet ABM breakout could produce, on short notice, a dangerous situation in which the USSR might be tempted in a crisis to attempt a preemptive strike against U.S. strategic missile forces on the assumption that any residual U.S. retaliation could largely be intercepted by the Soviet defense system. Jones & Hildreth, *supra* note 226, at 2. Assistant Secretary of Defense Richard Perle testified before the Senate Armed Services Committee on May 7, 1985:

I think there is a very real concern that the Soviets may be in the process even now of breaking out of the ABM Treaty and confronting this control with the prospect that a significant fraction of our retaliatory forces could be intercepted if and when the Soviets choose to put these various elements together in an integrated system.

Senate Hearings, *supra* note 211, at 61.

limitations.³²³ The ABM Treaty, under this option, will be allowed simply to wither away.

The legal options available to President Reagan are limited by the Administration's actions to date. Resort to the Standing Consultative Commission appears to be out of the question.³²⁴ Withdrawal under the Article XV procedures is available, but it places the United States in the awkward political position of terminating the only bilateral U.S.-USSR strategic arms limitation agreement currently in effect. A unilateral U.S. ABM breakout, without invoking any of the legal treaty termination procedures, is even worse because the United States will be seen as flagrantly disregarding treaty provisions on an equal basis with the USSR.³²⁵ The most realistic option provided by the ABM Treaty, which politically may preserve some essence of the desire for arms control, is amendment under Article XIV. In order to obtain treaty amendment, the issue naturally must be linked with broader arms control talks now taking place between the

³²³Lieutenant General James Abrahamson suggests that if the Soviets try to break out of the ABM Treaty, "we might go into terminal systems fairly soon." *What's Next for Star Wars*, Newsweek, Dec. 2, 1985, at 47. Assistant Secretary of Defense Richard Perle presented the following prepared statement to the Senate Armed Services Committee on May 7, 1985:

At this time we are looking at a series of military response options to a Soviet ABM "breakout." Possible options run the gamut from an increase in our strategic force capability ... to actions that would result in improvements of our near term deployment potential for missile defenses of our own.

Senate Hearings, *supra* note 211, at 67; *see also* Senate Report, *supra* note 5, at 2-3; T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 31. Critics of this view counter that any breakout advantage the Soviets may gain can be countered if the United States increases the ability of its ballistic missile force to penetrate future Soviet ABM systems. Also, by pursuing ABM programs to the maximum extent allowable under ABM Treaty limitations, the United States can ensure that the USSR does not gain a significant advantage as the result of its breakout. In any event, Soviet breakout is seen by critics as insufficient reason for the United States to abandon the ABM Treaty; rather Soviet violations are treated as political problems. Glasser, *supra* note 259, at 43, 54-55.

³²⁴*See supra* text accompanying notes 299-300. However, U.S. and Soviet negotiators at the Geneva disarmament talks recently agreed to set up a special working group to review the ABM Treaty with regard to the permissible testing and development of ABM systems. Wash. Post, Jan. 31, 1987, at A1.

³²⁵There is evidence that the USSR is willing to exploit U.S. violations in the forum of world opinion. On January 30, 1984, the USSR publicized an aide-memoire that had been delivered by its Washington Embassy to the U.S. State Department, containing a long list of allegations of U.S. noncompliance with various arms control agreements. Concerning the ABM Treaty, it alleged a number of violations and specifically mentioned SDI, which, it alleged, "if deployed, would go beyond the bounds" of the ABM Treaty and "would, in essence, work to undercut that Treaty." *Quoted* in Senate Armed Services Committee, *supra* note 211, at 25.

United States and the USSR.³²⁶ A major obstacle to this is the Soviet Union's seeming lack of interest in modifying the ABM Treaty to accommodate SDI.³²⁷ On the practical side, the issue probably is too complex and U.S.-USSR technologies too asymmetric to achieve amendment of the existing treaty. As a result, the ABM controversy likely **will** be resolved, if at **all**, not through legal means provided in the ABM Treaty, but rather politically through bilateral U.S.-USSR negotiations in the context of strategic arms bargaining, with little or no reference to the existing ABM Treaty.³²⁸

One conclusion about the ABM Treaty is clear: the crucial terms are extremely ambiguous and inappropriate to the current state of ABM technology. If the treaty provisions are to operate as effective constraints in the future, the United States and the USSR must somehow devise precise language that applies to the new "exotic" technologies. This will have to be accomplished in the Standing Consultative Commission. Then, the parties will have to reaffirm politically their commitment to following the treaty's terms. This second step may today be impossible, considering the momentum of technological development and the inherent resistance to technological regression, and the enthusiasm with which **SDI** converts view the stated benefits of a strategy based not upon assured destruction but instead upon assured survival.

IV. OTHER ARMS CONTROL AGREEMENTS: SALT I, SALT II, AND THE LIMITED TEST BAN TREATY

A. *SALT I AND SALT II*

A brief examination of the SALT agreements places the ABM Treaty and, to some extent, the Outer Space Treaty, into clearer perspective. The Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms (SALT II)³²⁹ was concluded on May 26, 1972, simultaneously with the ABM Treaty. As its title suggests, it was of limited

³²⁶See *supra* text accompanying note 304.

³²⁷See *supra* text accompanying note 305.

³²⁸See *infra* text accompanying notes 434-47.

³²⁹SALT I, *supra* note 62.

duration and scope. It was to remain in force for five years unless replaced earlier by a subsequent, more complete agreement.³³⁰ SALT I, therefore, was a holding action, designed to complement the ABM Treaty by limiting competition in offensive strategic missiles until further negotiations could reach more conclusive results.³³¹ The subsequent, more complete agreement to which the parties looked is the same agreement contemplated by the U.S. delegation in Unilateral Statement A during the ABM Treaty negotiations.³³² In September 1977, the United States and the USSR formally stated that, although SALT I was due to expire, they would not take any action inconsistent with its provisions.³³³

New negotiations began immediately following conclusion of SALT I, in accordance with Article VII of that agreement, which committed both sides to continue active negotiations on strategic offensive arms.³³⁴ On June 18, 1979 in Vienna, President Jimmy Carter and General Secretary Leonid Brezhnev signed the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (SALT II).³³⁵ SALT II was to remain in force through December 31, 1985.³³⁶ Senate consent was never provided, and the term of the treaty has expired. Nevertheless, the Reagan Administration initially declared that it would abide by the SALT II constraints as long as the USSR continued to do likewise. Recently, however, President Reagan called the treaty dead and explained that the SALT II limits no longer exist.³³⁷ It is within this context that

³³⁰*Id.* art. VIII.

³³¹*Id.* preamble. The agreement placed a freeze on each side on the number of fixed land-based strategic ballistic missile launchers and on submarine ballistic missile launchers. It allowed a certain amount of choice between types of launchers and permitted some increases in new systems if offset by corresponding dismantling of older systems. See U.S. Arms Control and Disarmament Agency, *supra* note 63, at 148; J. Goldblat, *supra* note 136, at 31.

³³²See *supra* text accompanying note 307.

³³³U.S. Arms Control and Disarmament Agency, *supra* note 63, at 240; J. Goldblat, *supra* note 136, at 31.

³³⁴SALT I, *supra* note 62, art. VII; see U.S. Arms Control and Disarmament Agency, *supra* note 63, at 239.

³³⁵SALT II, *supra* note 63.

³³⁶*Id.* art. XIX.

³³⁷U.S. Arms Control and Disarmament Agency, *supra* note 63, at 241; Wash. Post, June 13, 1986, at A1, col. 2. The legal effect of SALT II is outside the scope of this article. President Reagan announced on May 27, 1986 that the U.S. considered SALT II limitations dead. The United States, he stated, would push the Soviet Union for a replacement treaty to reduce superpower arsenals. The change in Administration policy in part was prompted by announcements that planned arming of the 131st B52 bomber with air-launched cruise missiles later that year would exceed SALT II limits. The President stressed that the U.S. will not actually exceed the treaty limits until that time and that, in any event, he would take Soviet actions on arms control into account before exceeding SALT

SALT II must be considered.

SALT II details a complicated plan of ceilings in the already high levels of strategic offensive arms. The quantitative limits were to attain a sort of parity between the asymmetrical offensive forces that would help provide an incentive for significant reductions that eventually were to follow. But the ceilings later were criticized because the numerical limits were set very high.³³⁸ Reagan Administration officials now state that events following the 1979 SALT II signing reveal that the USSR never intended to settle for the rough offensive strategic parity contemplated by the SALT process. Consequently, there resulted a feeling that the basic assumptions underlying the ABM Treaty were altered substantially.³³⁹

Another side to the failure of SALT II is cited by SDI critics who assert that it is SDI that threatens the numerical limits set by SALT II. The rationale is that new U.S. ABM technologies will force the USSR to respond with a continuing build-up in strategic offensive missile forces in order to overcome the ABM defenses, thereby stimulating the arms race in precisely those areas that are most critical to future U.S.-USSR arms control negotiations, namely, large MIRV and cruise missiles.³⁴⁰ The same rationale applies equally, of course, to the effects of Soviet ABM development on a U.S. build-up.³⁴¹

Although SALT II generally is applicable to strategic offensive weapons, Article IX may be applicable to some ABM systems contemplated by SDI. Paragraph 1, subparagraph (c) states: "Each Party undertakes not to develop, test, or deploy . . . systems for *placing into Earth orbit* nuclear weapons or any other kind of weapons of mass destruction, including fractional orbital missiles" ³⁴² Significantly, this article expands the Outer Space Treaty by banning the development, testing, and deployment of systems for placing weapons of mass destruction,

limits. Wash. Post, June 13, 1986, at A1, col. 2. See Wash. Post, June 20, 1986, at A1, col. 1. The United States, in fact, deployed the 131st B52 bomber capable of carrying cruise missiles on November 28, 1986, thereby exceeding the upper SALT II limits. Wash. Post, Nov. 29, 1986, at A1, col. 1 and A2, col. 5.

³³⁸ See *id.* at 242-46; J. Goldblat, *supra* note 136, at 33-38.

³³⁹ McFarlane, Bureau of Public Affairs, U.S. Dep't of State, Current Pol. No. 670, Strategic Defense Initiative I (1985). The policy statement is derived from an address by Robert C. McFarlane, then Assistant to the President for National Security Affairs. See *supra* text accompanying note 310.

³⁴⁰ Clausen, *SDI in Search of a Mission*, 2 World Pol'y J., 267 (1985).

³⁴¹ Senate Hearings, *supra* note 211, at 50; McFarlane, *supra* note 339, at 2.

³⁴² SALT II, *supra* note 63, art. IX, ¶ 1(c) (emphasis added). For a brief explanation of "fractional orbital missiles," see *supra* text accompanying note 118.

including nuclear weapons, into orbit,³⁴³ whereas the Outer Space Treaty bans only the actual deployment into outer space of the weapons of mass destruction and nuclear weapons themselves.³⁴⁴ With respect to ABM systems currently being contemplated by SDI, Article IX could apply not only to the nuclear powered x-ray laser discussed earlier, but also to systems being designed to place the x-ray laser into outer space. The issue's resolution depends upon how literally the SALT II drafters intended "Earth orbit" to be taken since the x-ray laser will not actually enter a full Earth orbit.³⁴⁵ The treaty provides no guidance in this regard.

B. THE LIMITED TEST BAN TREATY

The Limited Test Ban Treaty provides an additional constraint on contemplated ABM defenses that involve nuclear explosions, such as the nuclear powered x-ray laser. In August 1963, the U.S., the United Kingdom, and the USSR concluded the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water.³⁴⁶ It was the first treaty to contain provisions relating to use of weapons in outer space.³⁴⁷ The treaty often is called the Limited Test Ban Treaty due to its limited scope—because of problems with verification the treaty does not extend to underground nuclear weapon tests.³⁴⁸ Article III opens the treaty to all States, and most countries have signed it; but there are significant holdouts, such as France and the People's Republic of China.³⁴⁹

The treaty consists of only five brief articles. The key provision is Article I, paragraph 1(a). It states: "Each of the parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control: ... in the atmosphere; beyond its limits, including outer space; or under water"³⁵⁰ The parties thereby expressed their objective of

³⁴³See J. Pournelle & D. Ing, *supra* note 24, at 106; Danielson, *supra* note 71, at 3; Russell, *supra* note 124, at 163.

³⁴⁴See *supra* text accompanying notes 102, 104, 112-13.

³⁴⁵See *supra* text accompanying notes 117-119.

³⁴⁶Limited Test Ban Treaty, *supra* note 64.

³⁴⁷See Danielson, *supra* note 71, at 2; U.S. Arms Control and Disarmament Agency, *supra* note 63, at 34-40.

³⁴⁸U.S. Arms Control and Disarmament Agency, *supra* note 63, at 35-39.

³⁴⁹*Id.* at 40; Limited Test Ban Treaty, *supra* note 64, art. 111.

³⁵⁰Limited Test Ban Treaty, *supra* note 64, art. I, ¶ 1(a). The language pertaining to "jurisdiction and control" does not provide a means for a state to escape the limitations of this article. State practice, as well as relevant treaties and U.N. resolutions, point to the "control" of activities in outer space on functional rather than on "territorial" or "boundary" bases. S. Lay & H. Taubenfeld, *supra* note 79, at 48.

encouraging arms control and halting the arms race, and minimizing the contamination of the environment by radioactive fallout.³⁵¹

SDI critics are quick to point out that the proposed nuclear powered x-ray laser cannot be tested fully without violating Article I of the Limited Test Ban Treaty, as the weapon's concept involves a nuclear explosion in outer space.³⁵² These critics are correct, because such an explosion clearly would violate the underlying environmental objectives of the treaty. But research, development, and testing of the nuclear powered x-ray laser short of actual detonation of the device in the atmosphere, in outer space, or under water is not prohibited by the Limited Test Ban Treaty. Consequently, underground nuclear detonations carried out as part of x-ray laser research do not violate this treaty.³⁵³ Actual deployment in outer space of an ABM system such as the nuclear powered x-ray laser also is permissible under the Limited Test Ban Treaty, because Article I prohibits only the "explosion" itself.³⁵⁴

In conclusion, the SALT agreements and the Limited Test Ban Treaty provide few constraints for SDI. The possible exception is the nuclear powered x-ray laser.

V. TECHNOLOGY TRANSFER AND NONPROLIFERATION

Technology transfer and nonproliferation are aspects of SDI that receive little attention from commentators but yet bear important future consequences. The ABM Treaty contains in Article IX a provision prohibiting the United States and the USSR from transferring to other States "ABM systems or their components limited by this Treaty."³⁵⁵ Article IX is supplemented by Agreed Statement G, which extends the prohibition to ABM "technical descriptions or blue prints."³⁵⁶ How the United

³⁵¹Limited Test Ban Treaty, *supra* note 64, preamble.

³⁵²See F. Dyson, Weapons and Hope 79 (1984) ("There is no way in which a full-scale ABM system could be given an operational test under conditions resembling a real attack. . . . A nuclear ABM could never be test-fined so long as the atmospheric test ban treaty remains in force."); T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 64 ("Full operational confidence in the effectiveness of such a weapon could require actual testing of the device in space."); Smith, *supra* note 35, at 71 ("No nation is likely to deploy a major weapon system without testing it in its operating environment.").

³⁵³See *supra* text accompanying note 292.

³⁵⁴Limited Test Ban Treaty, *supra* note 64, art. I, ¶ 1(a).

³⁵⁵ABM Treaty, *supra* note 4, art. IX.

³⁵⁶*Id.* Agreed Statement G.

States applies these provisions will have great impact on its relations with States that might gain from participating in SDI, or conversely, that might have technology to contribute to SDI. The result may be closer US. relations with its allies, or it could have the opposite effect of driving a wedge between the United States and its allies.

A. THE IMPACT ON ALLIES— ABM TREATY PROVISIONS

President Reagan has attempted to secure European participation in SDI for a number of reasons. For one, he desires to claim the program as an important part of U.S.-NATO relations, thereby making it harder for SDI opponents to stifle the project.³⁵⁷ He also desires to secure access to certain European allied states' technologies that could benefit the technological development phase of the program.³⁵⁸ The Reagan Administration also believes that securing allied support for SDI by offering technological benefits will counteract the concerns expressed by some NATO allies that SDI is the chief obstacle to future US.-USSR arms control agreements.³⁵⁹ The USSR aggressively exploits the arms control issue as a part of its campaign against SDI and has bluntly warned several US. allies that their participation in SDI would make them accomplices to US. violations of the ABM Treaty.³⁶⁰ The Federal Republic of Germany in particular has been singled out as a target of this tactic, and it has caused demonstrable internal political effects on that State which, for unique reasons, feels compelled to consider SDI's impact upon "Ostpolitik."³⁶¹ The fact that the ABM Treaty

³⁵⁷Wash. Post, Sep. 17, 1985, at A1, col. 2.

³⁵⁸See Kozicharow, *U.S. Launches Program to Bring NATO Into SDI Research Role*, Aviation Week & Space Tech., March 11, 1985, at 55.

³⁵⁹Wash. Post, Sept. 5, 1985, at A1, col. 6; Wash. Post, Oct. 31, 1985, at A21, col. 5.

³⁶⁰Soviet Foreign Minister Edward Shevardnadze, during a January 1986 visit to Tokyo for meetings with Japanese Foreign Minister Shintaro Abe, warned that "Japan should consider carefully where its own national interest lies on this SDI issue." Foreign Minister Abe snapped back: "Japan ... will make its own independent decision on SDI within the context of its security arrangement with the United States." The heated exchange opened the first such USSR-Japan talks in Japan since 1976, and the first serious attempt by the USSR to improve relations with Japan since 1978. Wash. Times, Jan. 16, 1986, at 1. Soviet leader Mikhail Gorbachev, in an October 1985 visit to Paris, sought to obtain French support against SDI. But French President Francois Mitterand, although having reservations about SDI, avoided being used in a Soviet propaganda campaign against the United States. Wash. Post, Oct. 3, 1985, at A1, col. 1.

³⁶¹In March 1985, then Soviet Foreign Minister Andrei A. Gromyko, during talks in Moscow with West German Foreign Minister Hans-Dietrich Genscher, said the

cannot be considered under legal rationale to extend to nonparty states does not alter the potential effectiveness of arms control "blackmail" by the USSR.³⁶²

The NATO allies, for their part, consider the ABM Treaty "a political and military keystone in the still shaky arch of security we have constructed with the East..."³⁶³ Like many SDI critics in the US., European misgivings about SDI focus on its impact on superpower stability, to which is linked a peaceful Europe. British Foreign Secretary Sir Geoffrey Howe summarized the central challenge of SDI to stability in a March 1985 address, in which he stated the importance to the allies of ascertaining "how best to enhance deterrence, how best to curb rather than stimulate a new arms race."³⁶⁴ He cautioned that SDI might stimulate a new arms race if it turned out to be only partially effective and created "a new Maginot Line of the 21st century, liable to be outflanked by relatively simpler and demonstrably

USSR would view West Germany as "an accomplice" in violating the ABM Treaty if it participated in SDI weapons development. Wash. Times, March 5, 1985, at 7B. In November 1985, Soviet leader Mikhail Gorbachev sent Chancellor Helmut Kohl a toughly worded letter warning Germany that it must choose "whether it will allow the material, scientific and technological potential of its country to be used for the realization of the most dangerous military plans in space, or whether it will assert its reputation and influence in order to contribute to bringing about mutually acceptable agreements." Wash. Post, Nov. 14, 1985, at A33, col. 6. The nature of West German participation in SDI reportedly prompted a major dispute within the West German government. Chancellor Kohl reportedly favors participation in SDI. But Foreign Minister Genscher reportedly views the ABM Treaty as the foundation of West German arms policy, and also desires not to injure prospects for warming relations between the two Germanys by annoying the USSR with a rush to join the United States in SDI. Wash. Post, Nov. 14, 1985, at A33, col. 6; Wash. Times, Nov. 28, 1985, at 4D.

³⁶²Vienna Convention, *supra* note 91, art. 34, states: "A treaty does not create either obligations or rights for a third State without its consent." Apparent exceptions to the rule exist. A rule expressed in a treaty may become binding on nonparties if it becomes a part of customary international law. It is doubtful that the ABM Treaty provisions can be regarded as customary international law, as it is a bilateral treaty and contains provisions allowing for its revision. Also, a right may inhere to a nonparty if the treaty parties intend this and the nonparty does not object. This exception also is inapplicable, as the United States and the USSR clearly had only their own nuclear offensive forces in mind when they negotiated the SALT agreements. See I. Brownlie, *supra* note 91, at 620-22.

³⁶³British Foreign Minister Sir Geoffrey Howe, *quoted in* T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 63. See Christian Science Monitor, March 18, 1985, at 15. British Prime Minister Margaret Thatcher, concerned that SDI could damage nuclear deterrence and violate the ABM Treaty, reportedly pressed President Reagan at Camp David in December 1985 into a joint communique committing the United States to policies that would enhance deterrence and that would make SDI advancement beyond research a matter for negotiations. Wash. Post, Dec. 7, 1985, at A1, col. 2.

³⁶⁴Christian Science Monitor, March 18, 1985, at 15.

cheaper countermeasures."³⁶⁵ Foreign Secretary Howe also made it clear that any European approval of SDI does not extend to deployment in violation of the ABM Treaty.³⁶⁶ West German officials remarked that Howe's remarks coincided with their country's views on SDI.³⁶⁷

SDI appears particularly threatening to Western Europeans who see it as an "American" defense. A defense that protects the United States while leaving Europe vulnerable to attack from the Soviet Union "decouples" European security from that of the United States.³⁶⁸ The "decoupling" is even more apparent when one considers that Great Britain and France feel themselves to some extent decapitated by an American ABM defense. Both Great Britain and France have relatively small nuclear forces, and the ABM Treaty is useful in preserving some degree of deterrence value for these arsenals so long as Soviet ABM capabilities are minimal. The United States, in the Anglo-French view, could overwhelm a Soviet ABM system by the size and sophistication of its ballistic missile force. But if the USSR built up its ABM capabilities in response to SDI, the smaller British and French nuclear forces would lose their deterrent value because they are insufficient to penetrate a determined Soviet ABM system.³⁶⁹ The Federal Republic of Germany expressed concern that vast infusions of money into SDI would divert resources from NATO forces in Central Europe, thereby upsetting the balance of conventional forces.³⁷⁰ Consequently, the NATO allies wanted some voice in President Reagan's future decisions regarding the direction of SDI.³⁷¹

The Reagan Administration responded to these European fears about the "decoupling" side effects of SDI by agreeing to European demands that any future U.S. decision to deploy an ABM system would be contingent upon negotiations with the NATO allies.³⁷² He further guaranteed that SDI would defend

³⁶⁵*Id.*

³⁶⁶*Id.*

³⁶⁷Baltimore Sun, March 26, 1985, at 4.

³⁶⁸See T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 62-63; Trevorton, *SDI-Bargaining Chip or Crack in the Alliance?*, 5 Def. Attache 10 (1985); Wash. Post, May 21, 1985, at A21, col. 1.

³⁶⁹See T. Longstreth, J. Pike & J. Rhinelander, *supra* note 119, at 62-63; Wash. Post, March 21, 1985, at A16, col. 1; Wash. Post, Sept. 5, 1985, at A1, col. 6.

³⁷⁰Wash. Post, March 21, 1985, at A16, col. 1; Wash. Post, Dec. 19, 1985, at A33, col. 5.

³⁷¹*Id.*

³⁷²British Prime Minister Margaret Thatcher reportedly expressed serious misgivings about SDI in a private meeting with President Reagan in December 1984, and extracted a promise that deployment of an ABM system would be a matter

NATO allies as well as the United States.³⁷³ Whether these assertions will have the intended effect remains to be seen; and it may be asserted by some Europeans that in any event sovereign States must "consent" before the United States unilaterally may extend an ABM system over their territories.³⁷⁴

Politically, the Europeans' caution is expressed in a policy that urges president Reagan to utilize SDI as a bargaining chip with the USSR in arms control negotiations.³⁷⁵ Chancellor Kohl of the Federal Republic of Germany in particular stressed that if U.S.-USSR negotiations in Geneva succeed in making drastic cuts in offensive nuclear weapons, the "deployment of space-based systems could become increasingly **superfluous**."³⁷⁶ Kohl and other European NATO leaders hoped that by influencing the United States in this direction, they could avoid serious divisions within NATO, and the United States could achieve substantial reductions in the Soviet nuclear arsenal.³⁷⁷

In return for allied support, the United States in March 1985 pledged a policy of cooperation and access to the high technology involved in SDI research.³⁷⁸ This shared research aspect of SDI,

for U.S.-European negotiations. T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 62. President Reagan reaffirmed this commitment to key allies, including Japan, at the May 1985 economic summit of the *six* leading industrialized democracies in Bonn. St. Louis Post-Dispatch, May 3, 1985, at 10.

³⁷³**Wash. Post**, Oct. 19, 1985, at A14, col. 1. United States advocates for SDI argue that a U.S. ABM defense makes the United States less vulnerable to Soviet nuclear attack. This strengthens basic NATO strategy because it restores the credibility of a U.S. deterrent that had become vulnerable to a Soviet first strike. A second argument stresses the benefits to Europeans of an American missile defense that will be effective not only against nuclear strategic missiles aimed at the United States, but equally effective against Soviet mediumrange SS-20 missiles aimed against European targets. See R. Jastrow, *supra* note 9, at 135-36; J. Pournelle & D. Ing, *supra* note 24, at 112-13; Thillaye, *supra* note 6, at 79.

³⁷⁴See *supra* note 362.

³⁷⁵**Reports** submitted to the North Atlantic Assembly in May 1985 by American, Canadian, British, and German legislators noted the potential divisions that SDI could cause within NATO. The British report cautioned: "A situation must not occur in which the Geneva [arms control] talks would be seen by Western Europe to fail only because of the U.S. refusal to limit SDI development." Chi. Tribune, May 6, 1985, at 5.

³⁷⁶**Wash. Post**, Mar. 21, 1985, at A16, col. 1.

³⁷⁷**Wash. Post**, Dec. 19, 1985, at A33, col. 5. NATO officials worry that the Soviets will not agree to arms cuts without limits on SDI. If SDI is not placed on the bargaining table, they believe, the USSR will build more ballistic missiles to overwhelm it. As a result, the U.S. should use Soviet fears about SDI as ruthlessly as possible as a bargaining chip for cuts in Soviet offensive strategic ballistic missiles. Boston Globe, Oct. 1, 1985, at 1.

³⁷⁸L.A. Times, Mar. 25, 1985, at 1. Chancellor Kohl also thinks German involvement in SDI research will place the Federal Republic in a better position to influence future U.S. decisions on space-based ABM deployment. Wash. Post, Mar. 21, 1985, at A16, col. 1.

ostensibly backed by allied States to counter the Soviets' own space defense program, quickly received qualified allied support. German Chancellor Helmut Kohl's characterization of allied interest in SDI research is more revealing: "A highly industrialized country like the Federal Republic of Germany and the other European allies must not be technologically decoupled."³⁷⁹ Significantly, all of the Europeans emphasized that their support for SDI does not extend to actual deployment.³⁸⁰ United States negotiations with Great Britain and the Federal Republic of Germany concerning the details of technology sharing demonstrate how difficult the issue is.

Great Britain particularly is attracted to the promise of technological windfall through participation in SDI research. Prime Minister Thatcher, Chancellor Kohl, and Italian Premier Bettino Craxi were among the first to indicate an interest in the American proposal for shared research.³⁸¹ Anglo-American negotiations on the details of British participation were arduous, but on December 6, 1985 British Defense Minister Michael Heseltine and U.S. Secretary of Defense Caspar W. Weinberger signed the first formal agreement detailing allied participation in SDI research.³⁸² The British Defense Ministry immediately appointed a chief to head its own SDI office, which will coordinate the activities of British companies desiring to participate in SDI.³⁸³ The contents of the agreement likely will not be publicized soon, but reported negotiations indicate the accord identified at least eighteen areas where British contractors appear capable of significantly contributing to SDI research, including laser, optics and computer research; electromagnetic rail guns; space sensors; and switching devices.³⁸⁴ Great Britain wanted the agreement to ensure that British contractors, in order to bid competitively, received the same security clearances and access to the same top-secret information as American firms competing for SDI contracts.³⁸⁵

³⁷⁹Kozicharow, *supra* note 358, at 55.

³⁸⁰L.A. Times, Mar. 25, 1985, at 1.

³⁸¹*Id.* Italian Prime Minister Bettino Craxi reportedly favors Italian participation in SDI research because of the technological benefits. Italy is expected to pursue negotiations with the United States on details. L.A. Times, Sept. 30, 1985, Part IV, at 2; La Stampa (Turin), Nov. 24, 1985, at 1-2, *reprinted in* Dep't of Defense, Current News, Spec. Ed. No. 1401, Feb. 6, 1986.

³⁸²Philadelphia Inquirer, Dec. 7, 1985, at 1; Wash. Post, Dec. 7, 1985, at A1, col. 2.

³⁸³Financial Times (London), Dec. 11, 1985, at 10; Wash. Post, Dec. 7, 1985, at A1, col. 2.

³⁸⁴Wash. Post, Oct. 31, 1985, at A21, col. 5; Wash. Post, Dec. 7, 1985, at A1, col. 2.

³⁸⁵Baltimore Sun, July 18, 1985, at 13; Wash. Post, Sept. 17, 1985, at A1, col. 2.

The chief obstacle to agreement reportedly was the difficulty in reconciling the shared-research plan with U.S. domestic legislation that restricts patent and technology transfers and requires case-by-case consideration.³⁸⁶

Negotiations with the Federal Republic of Germany were even more difficult. A top-level German delegation headed by Chancellor Kohl's adviser on foreign and security affairs visited Washington in September 1985 to seek assurances that German firms will have full access to new technologies likely to emerge from SDI research.³⁸⁷ German officials particularly were embarrassed by recent spy scandals and desired to quell U.S. hesitations that allowing German access to classified data and advanced technology was risky. The Germans made it clear that they did not want to be relegated to the role of "subcontractors" and that they expected issues such as patents and licensing rights to be resolved in a manner that would ensure long-term technological and commercial benefits for German companies.³⁸⁸ Further, the delegation conveyed Bonn's conviction that the ABM Treaty should be upheld and that SDI should not be an obstacle to US-USSR arms talks, but rather should be utilized as a bargaining chip to achieve reduced ballistic missile arsenals.³⁸⁹

Pentagon officials recognized the German Government's ambivalence about SDI and reassured it that foreign contractors could participate in research without umbrella agreements from their governments, even though a government-to-government accord like that with Great Britain would be more useful to the United States politically.³⁹⁰ European companies, however, urged their

³⁸⁶Baltimore Sun, July 18, 1985, at 13; Wash. Post, Sept. 17, 1985, at A1, col. 2; Wash. Post, Oct. 26, 1985, at A7, col. 1. Domestic statutory constraints on technology transfer are outside the scope of this article. For information purposes, several statutes affect the shared-technology program, among them: The International Security Assistance and Arms Export Control Act of 1976 § 38, **as amended**, 22 U.S.C. § 2778 (1982), and its implementation through Office of Munitions Control regulations, 22 C.F.R. §§ 121.1-128.16 (1986); and the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1982), and its implementation in Department of Commerce export regulations, 15 C.F.R. §§ 368.1-399.2 (1986). For an overview of technology transfer in the area of foreign military sales, see Arms Transfers in the Modern World 155-70 (S. Neuman & R. Harkavy ed. 1979).

"Wash. Post, Sept. 5, 1985, at A1, col. 6; Boston Globe, Sept. 4, 1985, at 6; Wash. Times, Sept. 9, 1985, at 3.

³⁸⁸*Id.*

³⁸⁹*Id.*

"Wash. Post, Sept. 17, 1985, at A1, col. 2., The Reagan Administration hoped that the British agreement would serve as a precedent for agreements with other allies, particularly West Germany and Italy, which were watching closely Anglo-American developments in this regard. Wash. Post, Oct. 31, 1985, at A21, col. 5.

governments to conclude agreements that would guarantee the firms patent rights in whatever technology they develop, as well as the right to make commercial use of the technology, subject, of course, to security considerations.³⁹¹ The resulting decision is a clear reflection of Bonn's dilemma. On December 18, 1985 the German Cabinet decided that Germany would negotiate an exchange of letters or a memorandum of understanding with the United States to protect the interests of German businesses by setting out guidelines on patent rights, transfer of technology, research results, and marketing arrangements, as well as pricing and secrecy rules. Predictably, the resulting agreement, signed on March 27, 1986, contained much less than the December 6 British agreement—neither a government apparatus for funneling SDI contracts to German firms nor public funds were made available by the Federal Republic of Germany.³⁹²

France especially did not want to be an SDI "subcontractor," and she became the first major NATO nation to refuse to participate in SDI research. Acting in response to the "American technological challenge," French President Francois Mitterand proposed a collective European answer to SDI, dubbed "Eureka." French Foreign Minister Roland Dumas, addressing the Western European Union in Bonn, stressed that if Europe did not respond to SDI with its own research program, "nothing can stop our researchers, our capital, our businesses from giving in to the temptation of temporary cooperation (with the United States), even though the European role would be reduced to that of a subcontractor."³⁹³ While SDI is a military program seeking to develop ABM technologies, Eureka is designed to develop high-technology products with primarily commercial applications.³⁹⁴

The French appeal presented a dilemma for NATO states that wanted to participate in SDI, but shared French suspicions that the United States was unwilling to accept European allies as full

³⁹¹N.Y. Times, Sept. 18, 1985, at A7, col. 1.

³⁹²Wash. Post, Dec. 19, 1985, at A33, col. 5; Wash. Post, Mar. 28, 1986, at A10, col. 3; Christian Science Monitor, Dec. 19, 1985, at 9; see Wash. Times, Nov. 28, 1985, at 4D, and Dec. 9, 1985, at 5B; Wash. Post, Mar. 20, 1986, at A25, col. 5; Wash. Post, Mar. 25, 1986, at A11, col. 1. Chancellor Kohl and conservative (CSU) partner Franz Josef Strauss apparently favored a formal government-to-government agreement like the Anglo-American accord. But the opposition Social Democrats (SPD) and Kohl's coalition partner, Foreign Minister Genscher, a Free Democrat, opposed state participation in SDI research. The Free Democrats prevailed by persuading Kohl to send Economics Minister Martin Bangemann to Washington to sign the agreements with Secretary Weinberger, thus emphasizing the commercial aspects of the program.

³⁹³Atlanta J. Const., April 28, 1985, at 34; see Chi. Tribune, May 6, 1985, at 5.

³⁹⁴Dallas Morning News, June 15, 1985, at 1G.

partners in the project. Even Great Britain endorsed Eureka, ostensibly to counter a possible “brain drain” of Europe’s “best and brightest” to the “American” SDI research project.³⁹⁵ The Federal Republic of Germany, caught in the dilemma of not desiring to distance itself from its close European partnership with France, and, like Britain and France, afraid of being left behind the United States in the technology race, threw its support to Eureka while making it clear that “the proposal to participate in SDI research remains on the table as well.”³⁹⁶ France and the United States, each aware of the potential for conflict created by competing programs, generally are careful to present participation in Eureka and SDI as compatible, although France at times is outspoken in its opposition to SDI on strategic and cost grounds.³⁹⁷

The Soviet Union predictably attacks any US attempt to obtain European participation in SDI research.³⁹⁸ It specifically warned the Federal Republic of Germany that any agreement with the United States ensuring an exchange of research findings would conflict with ABM Treaty provisions forbidding the United States and the USSR from sharing ABM technologies with other States.³⁹⁹ While the Federal Republic of Germany cannot violate a treaty to which it is not party,⁴⁰⁰ U.S. conduct in this regard should be examined for ABM Treaty compliance. Article IX, prohibiting the transfer of “ABM systems or their components,”⁴⁰¹ is not violated by U.S.-allied cooperation on SDI research, assuming that the technology-sharing program remains strictly a “research” program—an unlikely prospect. If the U.S. transfers completed ABM components to one of its allies so that they can be developed or tested further, this action clearly would violate Article IX and the intent of the treaty to restrict ABM systems. At some point in the future a participating U.S. ally is

³⁹⁵J. of Com., June 4, 1985, at 4; Atlanta J. Const., April 28, 1985, at 34; Dallas Morning News, June 15, 1985, at 1G.

³⁹⁶Wash. Post, May 21, 1985, at 21, col. 1; see Christian Science Monitor, June 28, 1985, at 9.

³⁹⁷Dallas Morning News, June 15, 1985, at 1G; Wash. Post, Dec. 18, 1985, at A23, col. 1. In May 1986, Conservative Prime Minister Jacques Chirac expressed his unqualified backing to SDI in what may portend a major shift in French policy. Wash. Post, May 23, 1986, at A26, col. 5.

³⁹⁸See *supra* text accompanying notes 360-61.

³⁹⁹Wash. Post, Nov. 14, 1985, at A33, col. 6.

⁴⁰⁰See *supra* note 362.

⁴⁰¹ABM Treaty, *supra* note 4, art. IX. The treaty prohibits the transfer only from a party to another State. If, for example, the Federal Republic of Germany alone develops an ABM component, the United States may receive the component without violating the ABM Treaty.

likely to require access to an ABM component in order to progress further with its SDI research. It is inconceivable that research will be halted at that point simply because the component cannot be transferred outside the United States. Agreed Statement G is even more likely to be violated in the future. It seems illogical to expect allies to conduct meaningful research programs in the absence of "technical descriptions or blue prints" of the ABM systems or components with which the particular item undergoing research is to interact.

One ambiguous area that likely will create future compliance problems with Article IX and Agreed Statement G is the transfer of antitactical ballistic missile (ATBM) system technology. ATBM systems are not covered by the ABM Treaty, so their transfer is not constrained. But the problem is that the distinction between ATBMs and ABM systems is becoming increasingly blurred, making verification that systems are solely ATBM-capable extremely difficult.⁴⁰² The United States already may be confronted with the issue by its cooperative program with Australia for the development of hypervelocity launcher technology.⁴⁰³ And the Reagan Administration has suggested that the Europeans participate in joint research for an ATBM to be deployed in Europe as one method of eliciting European enthusiasm for SDI research.⁴⁰⁴

Overall, the effort to obtain allied participation in SDI research is only partially successful. Within NATO, Great Britain pledges participation and the Federal Republic of Germany and Italy appear ready to offer some degree of participation.⁴⁰⁵ But France, Denmark, Norway,⁴⁰⁶ and Canada⁴⁰⁷ refuse to play any role in

⁴⁰²See U. Ra'anani & R. Pfaltzgraff, Jr., *supra* note 71, at 64; *supra* text accompanying notes 264-65.

⁴⁰³Australian Prime Minister Hawke stated that Australian research related to the SDI hypervelocity launcher will be confined to non-SDI applications. T. Longstreth, J. Pike & J. Rhineland, *supra* note 119, at 48, 63.

⁴⁰⁴Wash. Post, March 26, 1985, at A12, col. 1; Oct. 12, 1985, at A14, col. 1. The European NATO States, led by the Federal Republic of Germany, recently have adopted as their own the idea of developing ATBM defenses against the short-range Soviet missiles on their borders. ATBM to many Europeans is a more stable and achievable alternative to SDI, and has the added benefit of not requiring their complicity in violating the ABM Treaty. L.A. Times, Dec. 19, 1985, at 24.

⁴⁰⁵See *supra* note 381 and text accompanying note 392.

⁴⁰⁶On April 17, 1985, Norway became the first NATO member to state publicly that it would not participate in SDI research. The Danish Parliament earlier voted against participation and urged its government to work against it. Boston Globe, Apr. 18, 1985, at 20; see Chi. Tribune, May 6, 1985, at 5.

⁴⁰⁷Canadian Prime Minister Brian Mulroney stated that Canadian government participation in SDI research is not in Canada's national interest, but that he

SDI. Outside NATO, Israel in May 1986 agreed to **participate**,⁴⁰⁸ but Japan shows reluctance by limiting its official position to a declaration that it “understands” the SDI research program being pursued by the United States.⁴⁰⁹ The lurking suspicion remains among America’s allies that SDI is not just a research program. Also, they have no strong desire to contribute to the demise of the ABM Treaty. To Europeans especially it is a symbol of the deterrence strategy that has protected them since the 1950s. SDI has proven again how difficult it is for NATO allies to cooperate among themselves for a common defense policy, and how divergent at times are U.S. and European strategic interests. To Europeans, SDI is another example of the U.S. proposing to “solve a problem we Europeans don’t want solved.”⁴¹⁰

B. THE NUCLEAR NON-PROLIFERATION TREATY

The 1968 Treaty on the Non-Proliferation of Nuclear Weapons⁴¹¹ affects elements of SDI that involve nuclear energy. The basic provisions of the treaty are designed to prevent the spread of nuclear **weapons**,⁴¹² provide assurance that the peaceful nuclear activities of states that have not developed nuclear weapons will not be diverted to making nuclear **weapons**,⁴¹³ to promote the peaceful uses of nuclear energy by making technology associated with peaceful nuclear use available to nonnuclear **states**,⁴¹⁴ and to encourage progress in arms control and nuclear disarmament.⁴¹⁵ The basic bargain established by the treaty was that states surrendering a future nuclear capability could expect nuclear

supports the U.S. effort as a prudent response to significant advances in Soviet nuclear weapons. At the same time, Mulroney expressed hopes that Canadian scientists and high-tech industries would bid on SDI contracts. L.A. Times, Sept. 8, 1985, at 4.

⁴⁰⁸From Reuters, *reprinted in* Dep’t of Defense, Current News, Spec. Ed. No. 1359, Oct. 17, 1985, at 13; Wash. Post, May 7, 1986, at A19, col. 1. The Israelis’ focus likely **will** be upon ground-based systems that have some tactical applications. *Id.*

⁴⁰⁹Wash. Times, Jan. 16, 1986, at 1. *See generally* Wash. Post, Sept. 17, 1985, at A1, col. 2. Japan, in July 1986, decided to permit private companies and research institutes to take part in SDI, largely out of concern about falling behind in developing technologies. N.Y. Times, Jul. 18, 1986, at A1, col. 1.

⁴¹⁰Treverton, *supra* note 368, at 10.

⁴¹¹Non-Proliferation Treaty, *supra* note 65.

⁴¹²*Id.* arts. I, II.

⁴¹³*Id.* art. III.

⁴¹⁴*Id.* arts. IV, V.

⁴¹⁵*Id.* art. VI; *see* U.S. Arms Control and Disarmament Agency, *supra* note 63, at 88.

weapons powers to reduce their nuclear arsenal.⁴¹⁶ In other words, the nuclear weapons powers attempted to freeze their number at five—the United States, USSR, Great Britain, France, and China.⁴¹⁷ In exchange, the nonnuclear states received a commitment that the nuclear states would pursue arms control negotiations “in good faith.”⁴¹⁸ The Non-Proliferation Treaty became the most widely-accepted arms control treaty, with more than **125** states party to it, but excluding France and the Peoples Republic of China.⁴¹⁹

The heart of the Non-Proliferation Treaty is Article I, which commits the nuclear weapon states “not to transfer to any recipient . . . nuclear weapons or other nuclear explosive devices or control over such weapons or devices . . .; and not in any way to assist, encourage, or induce any nonnuclear-weapon state to manufacture or otherwise acquire” such devices.⁴²⁰ Conversely, in Article II, nonnuclear weapon states pledged not to *receive* or *manufacture* such **weapons**.⁴²¹ No provision, however, prohibits these nonnuclear weapon states from independently *designing* their own nuclear weapons.⁴²² A U.S. Nuclear Non-Proliferation Act⁴²³ gave meaning to the provisions, making every transfer of nuclear items dependent on an executive branch finding that such exports “will not be inimical to the common defense and security;” and requiring that every export license be considered on its non-proliferation merits.⁴²⁴

Without question, the Non-Proliferation Treaty applies only to nuclear weapons and devices. Although the ABM systems envisioned by SDI are characterized as basically nonnuclear, the nuclear powered x-ray laser is a nuclear device. The laser itself is not a nuclear weapon, but its functioning requires a “nuclear explosive device” to generate the x-ray.⁴²⁵ Article I of the treaty clearly extends not only to nuclear weapons, but also to “other nuclear explosive devices.”⁴²⁶ Article I does not allow a nuclear

⁴¹⁶Stockholm International Peace Research Institute, *The NPT: The Main Political Barrier to Nuclear Weapon Proliferation* 34 (1980)[hereinafter SIPRI]; see also J. Goldblat, *supra* note 136, at 44-45.

⁴¹⁷SIPRI, *supra* note 416, at 9.

⁴¹⁸Non-Proliferation Treaty, art. VI.

⁴¹⁹Adelman, *supra* note 225, at 3.

⁴²⁰Non-Proliferation Treaty, art. I.

⁴²¹*Id.* art. II.

⁴²²SIPRI, *supra* note 416, at 24.

⁴²³Nuclear Non-Proliferation Act of 1978, 22 U.S.C. § 3201 (1982).

⁴²⁴*Id.*; SIPRI, *supra* note 416, at 27.

⁴²⁵See *supra* note 50.

⁴²⁶Non-Proliferation Treaty, *supra* note 65, art. I.

weapon state "to assist, encourage, or induce any nonnuclear-weapon State" to obtain such a device.⁴²⁷ Consequently, any Reagan Administration plea for allied participation in research on the nuclear powered x-ray laser must exclude nonnuclear weapon allied states, such as the Federal Republic of Germany, Italy, or Japan. The United States may induce and assist nuclear weapon states, such as Great Britain or France, to participate in SDI research involving a nuclear explosive device. But the United States may not transfer to any state, nuclear or nonnuclear, a completed nuclear weapon or nuclear explosive device.⁴²⁸

Similar reasoning applies in article II to prevent nonnuclear states from receiving or independently manufacturing nuclear weapons. Further, these states are barred from seeking or receiving "any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."⁴²⁹ As a result, the nonnuclear states that might respond to a U.S. invitation to participate in nuclear powered x-ray laser research themselves would violate Article II if they sought or received any U.S. assistance in manufacturing the device. They would not violate Article II if U.S. assistance amounted to something less than manufacturing, such as assistance with laboratory research.

The Non-Proliferation Treaty is not a major obstacle to SDI, because it is pertinent only to one element of the program. The Reagan Administration realizes the importance of nuclear nonproliferation and recently has taken additional measures to ensure that it remains a strong instrument in the future.⁴³⁰ The President is not likely to permit SDI to erode the Nuclear Non-Proliferation Treaty.

⁴²⁷*Id.*

⁴²⁸*Id.*

⁴²⁹*Id.* art. II.

⁴³⁰Kenneth L. Adelman cited the July 1985 nuclear cooperation agreement between the United States and the People's Republic of China as signifying "a major event in our nonproliferation effort." Adelman, *supra* note 225, at 4. The Agreement for Cooperation Between the Government of the United States of America and The Government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy is the first bilateral peaceful nuclear cooperation agreement with a Communist country and the only such agreement with another nuclear-weapon state (France and Great Britain fall under U.S. agreements with EURATOM). Premier Zhao made statements during negotiations that China will not contribute to proliferation. The United States and China agreed to cooperate in the use of nuclear energy for "peaceful purposes," and agreed to allow the transfer of information and technology concerning such use. Significantly, the agreement included a definition of "peaceful purposes" that excluded "any military purpose." It also prohibited the use of any materials transferred under the agreement for research, development or construction of any nuclear explosive device or for any military purpose. Reprinted in 24 I.L.M. 1393-1407 (1985).

VI. SDI: GLOBAL ORDER OR GLOBAL DISORDER?

One of the Reagan Administration's rationales for pursuing SDI is that it can break the arms control deadlock—the U.S. ABM defenses can provide the impetus for Soviet offensive nuclear force reductions.⁴³¹ The Administration is ambiguous, however, on how to attain its goal. Will SDI become a nonnegotiable basis of a new defense-dominated strategy, as envisioned initially by President Reagan, in which offensive arms reductions are achieved as a natural reaction to strategic ballistic missile **obsolescence**?⁴³² Or may SDI be used as a “bargaining chip” that could be negotiated away in return for Soviet offensive concessions?⁴³³

A. NEGOTIABILITY OF SDI

Different points of view exist concerning whether SDI should be used as a bargaining chip in arms control negotiations with the Soviet Union. President Richard M. Nixon and Former Secretary of Defense James R. Schlesinger call SDI “the ultimate bargaining **chip**.”⁴³⁴ Paul Warnke, former director of the Arms Control

⁴³¹The State Department declared:

[T]he overriding, long-term importance of SDI is that it offers the possibility of reversing the dangerous military trends ... by moving to a better, more stable basis for deterrence and by providing new and compelling incentives to the Soviet Union for seriously negotiating reductions in existing offensive nuclear arsenals.

Special Report, *supra* note 5, at 3.

⁴³²See *supra* text accompanying note 32. A possible scenario for a strategic missile “build-down” is described in R. Jastrow, *supra* note 9, at 139-40.

⁴³³See Clausen, *supra* note 340, at 264-68.

⁴³⁴Wash. Post, Nov. 18, 1985, at A1, col. 3. Former Secretary of Defense Schlesinger states his position:

That grand design—of limits on Soviet offensive forces in exchange for constraint on American defense technologies—lies before us again, beckoning. If, through Soviet fears of American space technology, we were able to achieve a breakthrough in arms control negotiations (in a rather unpromising era), the President's launching of his new initiative would have fulfilled its most laudable purpose. In short, perhaps the best use of the Strategic Defense Initiative lies in that much maligned role of bargaining chip. Indeed, one might say, the Strategic Defense Initiative is the quintessential bargaining chip.

Schlesinger, *supra* note 168, at 12. Freeman Dyson, of the Institute for Advanced Studies at Princeton, presents interesting views concerning SDI bargaining. He concludes that MAD is immoral, and he favors SDI as a long-range objective. But he argues that SDI and arms control of offensive weapons are interrelated, and that neither can be pursued independently; rather, they must be pursued together in a “balanced fashion.” Once the arms control negotiations have achieved agreement to abolish strategic offensive weapons, SDI can be deployed to ensure

and Disarmament Agency, opined: "There's no question that SDI is an effective lever for getting us to the negotiating table. But the question is, are you going to use it for bargaining, or are you going to throw it **away**?"⁴³⁵ And many Congressmen, eager to show their support for budget cutting and for arms control progress, are urging President Reagan to use SDI as a bargaining chip.⁴³⁶ Within the Reagan Administration, former National Security Adviser Robert C. McFarlane, and, to some degree, Special Arms Control Adviser Paul H. Nitze reportedly urge President Reagan to consider using SDI as a means for striking a better bargain with the USSR for reductions in strategic offensive weapons.⁴³⁷ The bargaining chip advocates within the administration apparently are offset by Secretary of Defense Caspar W. Weinberger and Assistant Secretary of Defense Richard N. Perle, who urge that SDI development remain nonnegotiable.⁴³⁸ President Reagan publicly states that the current SDI "research" program is not subject to negotiation, although eventual deployment might be.⁴³⁹ But the different points of view held by influential people within and outside the Administration keep open the possibility that, in the right circumstances, parts of the

against "cheaters." Dyson, *supra* note 352. Dyson is criticized by staunch SDI advocates who contend that he does not go far enough towards answering the question of what to do if negotiations with the USSR are unsuccessful. J. Pournelle & D. Ing, *supra* note 24, at 160-63.

⁴³⁵*What's Next* for Star Wars, Newsweek, Dec. 2, 1985, at 45.

⁴³⁶*Id.* The Defense Department is attempting to protect SDI from the budget-cutting effects of the so-called Gramm-Rudman balanced-budget law by sharing funds from other Defense programs, such as the MX missile. L.A. Times, Jan. 16, 1986, at 1.

⁴³⁷Robert C. McFarlane reportedly views an arms control bargain including SDI as "the sting of the century." The United States, in **his** view, would be swapping an ABM defense that does not yet exist, and that many scientists state **will** not work, for existing Soviet strategic ballistic missiles having certain destructive capability. Wash. Post. Nov. 18, 1985, at A1, col. 3.

⁴³⁸*Id.* In last-minute pre-summit advice to President Reagan in November 1985, Defense Secretary Weinberger advised the President that he "**will** almost certainly come under greater pressure to limit SDI research, development and testing to only that research allowed under the most restrictive interpretation of the . . . [ABM] Treaty." He added that any such "agreement to limit the SDI program according to the narrow (and, I believe, wrong) interpretation of the ABM Treaty" would harm the SDI program. Wash. Post, Nov. 16, 1985, at A1, col. 1.

⁴³⁹In October 1985, the United States offered to negotiate with the USSR any proposed deployment of new ABM weapons, and proposed to give the USSR five to seven years before deploying the defensive weapons **unilaterally**. The US. "concession" would not have any effect on continuing research and testing, but the deployment notice-period would give the USSR the chance to deploy comparable ABM systems. Wash. Post. Oct. 24, 1985, at A1, col. 1. Along these lines President Reagan reaffirmed in August 1986: "[O]ur response to demands that we cut off or delay research and testing and close shop is: no way. SDI is no bargaining chip. . . . And the research is not, and never has been, negotiable." Dep't St. Bull., Oct. 1986, at 2.

SDI program in addition to deployment may become part of the arms control bargaining process. President Reagan has not completely foreclosed the "bargaining chip" option.

Soviet leader Mikhail Gorbachev consistently urges the negotiability of SDI. In September 1985, Gorbachev told a U.S. Senate delegation visiting Moscow that the **USSR** would make "radical proposals" to reduce offensive nuclear arms one day after the **U.S.** agreed to prohibit the "militarization" of space.⁴⁴⁰ Gorbachev followed this by proposing in October that the United States and the USSR agree to cut their respective strategic missile forces in half and negotiate a complete ban on SDI development and deployment.⁴⁴¹ President Reagan's response to Gorbachev's presummit maneuvering indicated a willingness to discuss SDI at the November 1985 Geneva summit, but offered concessions on offensive weapons only.⁴⁴² Both sides ultimately were disappointed by the lack of concrete progress on arms control at the November Geneva summit, which nevertheless accomplished its likely primary goal of permitting the high level face-to-face exchange of views.⁴⁴³ Additional arms control proposals followed the Geneva summit, including imaginative new proposals at the Reykjavik, Iceland summit in October 1986 and in March 1987. But none to date has evoked any agreement on limitation of SDI. The United States, for its part, remains committed to using only part of SDI's potential as a bargaining chip—the part dealing with actual deployment of an **ABM system**.⁴⁴⁴

⁴⁴⁰Wash. Post, Sept. 4, 1985, at A1, col. 2.

⁴⁴¹L.A. Times, Oct. 2, 1985, at 6; Wash. Post, Oct. 4, 1985, at A1, col. 4; Wash. Post, Nov. 1, 1985, at A22, col. 1.

⁴⁴²President Reagan announced on October 31, 1985: "We seek in Geneva to undertake with the Soviets a serious examination of the important relationship between offensive and defensive forces, and how people everywhere can benefit from exploring the potential of nonnuclear defenses . . ." Wash. Post, Nov. 1, 1985, at A22, col. 1.

⁴⁴³See Wash. Post, Nov. 21, 1985, at A1, col. 2; Wash. Post, Nov. 24, 1985, at A1, col. 1.

⁴⁴⁴In January 1986, the USSR offered a new proposal to rid the world of nuclear weapons within fifteen years. It involves three overlapping stages. First, within five to eight years, the United States and the USSR would cut strategic forces by 50 percent. Both countries would dismantle their intermediate-range nuclear forces in Europe, and the British and French arsenals would be confined to their current state. Both superpowers would renounce space weapons and **all** nuclear testing. In 1990 the other nuclear nations would dismantle their arsenals, starting with tactical nuclear weapons. They also would join in banning space weapons and nuclear testing. **Also** during this stage, nonnuclear weapons based on "new physical principles" would be banned. By 1995, **all** remaining nuclear weapons would begin to be eliminated. **A** universal accord would ban their ever being reconstructed. *Getting to Zero*, Newsweek, Jan. 27, 1986, at 30. United States

Despite U.S. pronouncements that “[o]ne of our main objectives in the Geneva arms control talks is to reverse this erosion of the ABM Treaty,”⁴⁴⁵ the hard bargaining position adopted by the Reagan Administration may counteract the objective. The real chance exists that the USSR will respond to the “nonnegotiability” of SDI by engaging in a parallel offensive-defensive arms race, while at the same time winning over public opinion by pointing to the United States as the cause of arms control failure. On the other hand, the Reagan Administration may already be using SDI as a bargaining chip, holding the SDI chip in reserve until convinced that the “hard bargain”—that is, a nonnegotiability play—has no chance of evoking a Soviet offensive missile reduction. The arms control negotiations in any event are in a very critical stage, and arms control stability to a great extent depends on the outcome of these negotiations. At the two extremes, President Reagan can either suddenly unilaterally abrogate the ABM Treaty—a prospect certainly damaging to arms control and to U.S. relations with its allies—or he could reaffirm the ABM Treaty, interpret it restrictively, and abandon SDI. The most attractive immediate formula lies someplace in between. It involves a U.S. willingness to negotiate with the USSR exact prohibitions on testing, development, and deployment

Defense Department officials understandably criticized the plan as a propaganda effort. Wash. Post, Jan. 24, 1986, at A28, col. 1. In June 1986, the USSR offered another proposal involving cuts in strategic nuclear arsenals specifically in exchange for limits on ABM research and continued U.S. adherence to the ABM Treaty for another fifteen to twenty years. Wash. Post, June 18, 1986, at A30, col. 4. On October 11-12, 1986, at Reykjavik, Iceland, President Reagan and Soviet leader Gorbachev reached some important tentative understandings before the two reached the fatal impasse over SDI. All mediumrange missiles would be banned from Europe—with the Soviets retaining 100 missiles in Asia and the U.S. retaining 100 missiles in the United States. All strategic nuclear arms would be reduced by 50 percent within five years; during the next five years, all remaining offensive ballistic missiles of all ranges would be eliminated. There also were tentative understandings regarding nuclear testing and some nonarms issues. The problem areas concerned a Soviet insistence on a U.S. pledge not to withdraw from the ABM Treaty for 10 years. During that time, only laboratory research on SDI would be permitted. President Reagan insisted that during the 10-year phase-out period, the U.S. would proceed with research, development, and testing of SDI, “done in conformity with ABM provisions.” At the end of the 10-year period, both sides could proceed to deploy advanced defenses. The President later emphasized that “SDI is America’s insurance policy that the Soviet Union would keep the commitments made at Reykjavik.” *President’s Address to the Nation, Oct. 13, 1986*, Dep’t. St. Bull., Dec., 1986, at 18; see N.Y. Times, Oct. 13, 1986, at A1, col. 3; N.Y. Times, Oct. 14, 1986, at A1, col. 5. In March 1987, the Soviet Union presented another arms control proposal to eliminate all medium-range missiles from Europe, as tentatively was agreed at Reykjavik. Surprisingly, the proposal for the first time did not appear to be contingent on curbing SDI research. *An Arms Offer Is Accepted*, U.S. News & World Rep., Mar. 16, 1987, at 26.

⁴⁴⁵Adelman, *supra* note 225, at 2.

of space-based ABM systems in exchange for Soviet agreement to make verifiable deep cuts in offensive strategic weapons.⁴⁴⁶ Research, of course, may continue. The final agreement should include a reasonable timetable for the reductions; and if the timetable is not respected, then the ABM Treaty automatically would terminate, and development and eventual deployment of ABM systems could proceed. The automatic termination provision can be added to the ABM Treaty by amendment or additional protocol.

A different scenario is presented by the unlikely situation in which President Reagan convinces the USSR that a strategy including ABM systems is desirable, or perhaps unavoidable. The ABM Treaty would need to be replaced with some new treaty that carefully describes the unstable transition period from MAD, to the mixed offensive-defensive strategy, to the ultimate defensive-based strategy. Otherwise, either State might greatly heighten tensions if it felt the other State was making quicker advances.⁴⁴⁷

B. STRATEGIC IMPLICATIONS

In what kind of environment does the arms control regime built during the 1960s and early 1970s have to operate? For one thing, it is an environment of changed premises—of failed basic assumptions. Technology to a large extent changed the premises upon which MAD and its progeny were based. Defending against nuclear war was considered contradictory to deterrence in the 1960s. Defense attempts were considered “destabilizing.” They brought “arms race instability,” because each side would build more offensive weapons to guarantee its own ability to retaliate after a first strike. And they brought crisis instability, because one side might believe that a first strike attack could so disrupt the opposing retaliatory forces that its own partial defense would

⁴⁴⁶See Hirschfeld, *Star Wars for Strategic Forces*, St. Louis Post-Dispatch, Oct. 9, 1985, at 3B. The formula is a suggestion offered in an editorial by Thomas J. Hirschfeld, former deputy assistant director of the U.S. Arms Control and Disarmament Agency and a former science and technology member of the State Department's Policy Planning Staff.

⁴⁴⁷At November 1985 Senate hearings, Lieutenant General James A. Abrahamson, director of the Strategic Defense Initiative Organization, addressed the difficulties of moving from offensive-based deterrence strategies to new strategies based on a combination of offensive and defensive weapons: “The key,” he said, “is to carefully draw down your offensive systems as you are building up your defensive systems,” a course that would require full cooperation of the superpowers.” Wash. Post, Nov. 18, 1985, at A1, col. 3; see Kupperman, *supra* note 311, at 82-83; Jones & Hildreth, *supra* note 226, at 5.

limit damage to an acceptable degree.⁴⁴⁸ SALT I and the ABM Treaty are evidence that both sides accepted this premise. However, Soviet progress in defenses reveals that the **USSR** no longer adheres to these principles.⁴⁴⁹

Rapid technological advances turned deterrence from a strategy based on mutual punishment (neither side would attack the other because the retaliatory punishment to its population was unacceptable) into a denial of objectives through offensive counterforce (as warheads became more accurate, the aggressor could target only the opponent's retaliatory force, making a first strike more acceptable as not much of the retaliatory force would **survive**).⁴⁵⁰ Arms race instability, therefore, was not halted by the limitation of ABM defenses. The strategic competition simply shifted qualitatively to more and better warheads. Nor was crisis instability halted by the ABM Treaty. With more and better warheads the superpowers are in a better position now than ever before to launch a first strike attack.⁴⁵¹ Soviet progress in development and deployment of accurate strategic weapons made the U.S. land-based retaliatory ballistic missile forces vulnerable, undercutting the basic premise of MAD which the ABM Treaty was supposed to preserve. As a result, U.S. ABM systems no longer are "destabilizing," but the vulnerability caused by the *lack* of an ABM is destabilizing.⁴⁵² This shift makes it reasonable to consider the denial of objectives through defensive counterforce—SDI—as a solution to the dilemma.⁴⁵³ As long as the immediate goal of SDI is **only** to assure the survivability of the retaliatory force, its ABM defenses can become a stabilizing force.⁴⁵⁴

⁴⁴⁸Kupperman, *supra* note 311, at 78.

⁴⁴⁹*See* Fought, *SDI: A Policy Analysis*, Naval War C. Rev., Nov.-Dec. 1985, at 59, 65. The author devised a theoretical model, focusing on "stability", and used it to analyze SDI, applying the model's analytical framework to technical and political considerations for research, development, and deployment decisions. He concludes that any instability caused by SDI can be offset by concurrent reductions in offensive strategic nuclear forces. He sees SDI as a way of breaking the arms control deadlock and creating an impetus for nuclear arms reductions on both sides.

⁴⁵⁰*Id.* at 66; Kupperman, *supra* note 311, at 79.

⁴⁵¹Kupperman, *supra* note 311, at 78.

⁴⁵²U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 61.

⁴⁵³Fought, *supra* note 449, at 66.

⁴⁵⁴"Former President Richard M. Nixon analogized "Such systems would be destabilizing if they provided a shield so you could use the sword." L.A. Times, July 1, 1984, at 10. SDI advocates point out that ABM point defense of U.S. ballistic missile silos and other critical elements of our strategic forces such as command, control, communications, and national command authority, can be achieved technically and economically. This is all that is needed to ensure that sufficient **U.S.** retaliatory nuclear forces can survive a Soviet first strike in order

SDI is supposed to compensate for the failure of the ABM Treaty and SALT I by creating stability where those treaties failed. The problem is that if the United States deploys an effective ABM system before the USSR, it creates instability by tipping the balance in favor of the United States. As a result, the USSR could view it as an attempt by the United States to gain superiority and could respond with a buildup of offensive arms.⁴⁵⁵ Stability could be maintained, however, by a corresponding U.S. reduction in offensive retaliatory forces—a mere substitution of one form of “insurance” against attack (the high numbers of offensive retaliatory forces providing the deterrent) for another form of “insurance” (an effective defense against Soviet attack).⁴⁵⁶ Supposedly, this offense-defense combination will offer a downward momentum that can be capitalized upon in arms control negotiations.⁴⁵⁷ Many arms control advocates are pessimistic about whether the USSR will respond according to theory.⁴⁵⁸ Although this decision whether to deploy a space-based system will not come during this “research” phase of SDI, the Reagan Administration is faced with current strategic realities that already are being shaped to some extent by SDI. It must decide how to approach changes in the SALT I and ABM Treaty regimes sooner rather than later.

C. THE ROLE OF INTERNATIONAL LAW

International law is one factor among many that combine to ensure that the world proceeds in any orderly, predictable fashion.⁴⁵⁹ Arms control agreements are part of that international

to preserve deterrence. Defense of populations is not feasible at this time and further complicates strategic theorizing. See U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 61; Kupperman, *supra* note 311, at 81.

⁴⁵⁵See Fought, *supra* note 449, at 80-81. Soviet leader Gorbachev told the delegates to the Supreme Soviet in November 1985: “The American administration is still tempted to try out the possibility of achieving military superiority... But we will find a response!” He continued, “[T]he Soviet Union will have to improve the accuracy and to raise the yield of its weapons so as to neutralize, if necessary, the electronic space machinery of Star Wars.” *Quoted in* Wash. Post, Nov. 28, 1985, at A1, col. 1.

⁴⁵⁶Fought, *supra* note 449, at 80-81.

⁴⁵⁷*Id.* at 83-84; S. Huntington, *supra* note 34, at 158-59.

⁴⁵⁸Clausen, *supra* note 340, at 264-68.

⁴⁵⁹See H. Bull, *The Anarchical Society: A Study of Order in World Politics* (1977). Hedley Bull examines international relations in terms of international order, defined as the pattern of international activity that promotes certain goals of the “society of States”. The goals generally are: preservation of the system and society of States; maintaining independence or the external sovereignty of States; peace; and certain common goals of all social life, such as limitation of violence, keeping promises between States (*pacta sunt servanda*), and stability of possession (mutual recognition of sovereignty). Bull maintains that order exists within the

law. If negotiated and followed wisely, these agreements, as with international law generally, can be useful in establishing the global order along compatible lines. The world recognizes the arms control agreements as part of the global ordering process; therefore, for many reasons, including world opinion or fear of sanctions, decision-makers generally pursue at least an appearance of adherence to the agreements.

States must apply international law in such a way as to ensure consistency with its goals. For the United States, security goals especially are important. The United States must ensure that international law does not remove its freedom to use noncoercive influence measures, or its freedom to use force and military measures for legitimate objectives, or its freedom to use force capabilities for maintaining a stable relationship with its principal competitor, the USSR.⁴⁶⁰ The ABM Treaty and the SALT process accomplished these goals to a great extent, because they were compatible with the world as it then existed. They no longer are compatible in their current configuration with U.S. goals; therefore, their utility as international law ordering mechanisms is limited. The agreements, with today's changed conditions, cannot accomplish the more specific goal of influencing the conduct of the USSR so that it falls within the global order in a manner compatible with U.S. goals. In other words, the ABM Treaty and SALT agreements no longer guarantee that on a strategic nuclear level, the Soviets are forced away from aggressive policies, from threat, from hostile and coercive competition, and from worldwide confrontation.⁴⁶¹

The effect of arms control agreements as part of the legal order is minimal. They contain measures and procedures for periodic review and discussion of associated problems, but they contain nothing beyond the threat of termination to ensure enforcement. This last sanction, although a "legal" sanction, shows how weak

basically anarchical world society because States agree on goals that are of common interest to all. These goals become specified in "rules", which may be laws, morality, custom, or simply "rules of the game." States are the institutions that give the rules effect. In carrying out this function, States collaborate by way of certain organizing concepts: balance of power, war, diplomacy, international law, and the managerial system of great powers (today the superpowers). International law, therefore, is just one of the organizing concepts. Bull views international law as related to the balance of power concept—international law can be maintained only if power and the will to use it is distributed so that States can uphold certain rights when they are infringed. Bull also recognizes that in some cases, international law, if applied too rigidly, can hinder international order.

"See U. Ra'anan & R. Pfaltzgraff, Jr., *supra* note 71, at 231.

"*Id.*

the legal order is. The sanctions that give arms control agreements enforceability are those available to states in their relations generally: the threat of the parties to use force to enforce them, to return to an arms race, or to engage in other acts of unfriendly relations such as suspending negotiations, employing embargoes, or breaking off relations.⁴⁶² The chief problem with enforceability of arms control agreements is that, in view of the state of obsolescence and deterioration of the arms control regime, the potential risks and costs of these enforcement tools are disproportionate compared to the minimal returns they might produce. Enforceability simply is no longer in the interests of **all** parties concerned.

Effective international law requires agreements that are compatible with states' goals—that perform functions within states' interests. SDI reflects changed circumstances that have affected changes in states' interests. International law must adapt to the changes if the legal order is to remain a factor for influencing states' behavior.

VII. CONCLUSION

SDI presents the most serious challenge yet faced by the current arms control regime. The legal, political and strategic obstacles to fulfillment of President Reagan's vision are immense. Overcoming these obstacles to SDI without sacrificing the largely stable superpower relationship will require an extremely skillful exercise of judgment by **U.S.** decision-makers.

The international agreement most affected by SDI is the ABM Treaty. The treaty applies to the new "exotic" technologies being researched for SDI. Application of the treaty provisions to the SDI technologies reveals that, for space-based ABM systems or components, research is permitted up to the point of field testing. At least to this extent, the Administration's program does not conflict with the ABM Treaty. Development, which begins with field testing, is prohibited, as are the subsequent stages of testing and eventual deployment. "Demonstrations" of space-based components to the ABM system do not get around the prohibition. Simply calling a "field test" a "demonstration" or a "component" an "adjunct" does not disguise the underlying purposes.

Development and testing of fixed land-based **ABM** systems are not prohibited. Deployment of fixed land-based ABM systems is limited by the geographical and quantitative site restrictions in

⁴⁶²*Id.* at 232-34.

the ABM Treaty. The fact that they may be launched into space in order to destroy incoming missiles does not make them "spacebased," so they are not restricted by the same treaty provisions that restrict space-based ABM systems.

Certain weapons development occurring under the aegis of SDI may create problems with respect to treaty provisions that restrict weapons developed for non-ABM purposes from being "tested in an ABM mode" or from "having ABM capabilities." The most pertinent weapons in this respect are ASAT and ATBM weapons, and also to some extent certain radars and sensor devices. As long as the Reagan Administration intermingles development and testing of weapons systems that have dual uses, or their components, it is in danger of violating the ABM Treaty provision. On the other hand, the difficulty in separating the dual use technology in an era of rapid technological change demonstrates one more instance of the ABM Treaty's unsuitability for controlling high-technology weapons development.

The most realistic method provided by the ABM Treaty for adapting the treaty to current circumstances is utilization of the treaty amendment procedures. Whether this method is realistic in the broader political-strategic context is another question.

SDI is little affected by the Outer Space Treaty. The ABM systems being considered under SDI, with the possible exception of the nuclear powered x-ray laser (depending on how it will be deployed), may be researched, developed, tested, and deployed without violating the Outer Space Treaty. The United Nations could extend the Outer Space Treaty prohibitions on weapons of mass destruction to encompass a ban on all space weapons, but this is unlikely in view of the already present "militarization" of outer space. SALT II has a provision that may expand the Outer Space Treaty by prohibiting the systems that are to place into orbit the weapons prohibited by the Outer Space Treaty. Finally, the Limited Test Ban Treaty bans an explosive nuclear test in outer space, thereby limiting the ability to fully test the nuclear powered x-ray laser.

SDI also presents technology transfer issues. The ABM Treaty bars the transfer of ABM systems or their components. Yet, the Reagan Administration's proposal for allied cooperation in SDI research will violate the prohibition unless cooperation is drastically restricted to the point that it would be meaningless from a technological standpoint. The chief issues here are not legal, but rather political, and the uncertain effect of President Reagan's

invitation for allied participation makes the decision appear questionable. The Nuclear Non-Proliferation Treaty restricts the transfer of nuclear weapons technology, so its impact is confined to those nuclear ABM systems or components envisioned by SDI, currently the nuclear powered x-ray laser. Nuclear non-proliferation particularly is important to the nuclear-weapon States, so it is unlikely that President Reagan will take any measures with respect to SDI that are against U.S. interests in supporting the Nuclear Non-Proliferation Treaty.

SDI cannot be examined in a vacuum that isolates the legal from the political strategic implications. Political realities are shaping U.S. approaches to the affected arms control agreements, and the arms control agreements are shaping to some degree U.S. approaches on dealing with changing political realities. This article examined the overlapping relationship of the two aspects and concludes that SDI entails great risks for the United States that present the Reagan Administration with a number of choices it must consider in deciding whether or how to proceed with SDI. The choices essentially must be ones of policy, tempered of course by legal rules. Politics predominates because the legal arms control regime cannot apply strictly today to a situation that is radically different from that for which it was designed. The ideal is for the Reagan Administration, working in cooperation with the Soviet Union and America's allies, to reshape the legal regime to fit current political-strategic realities. Whether this is accomplished by political bargaining, by termination of existing agreements, or by gradual erosion of existing agreements and evolution to a new custom, are the realistic choices facing the administration. At this juncture, the use of SDI as a political bargaining chip for achieving negotiated arms reductions is particularly attractive.

HOW TO IMPROVE MILITARY SEARCH AND SEIZURE LAW

by Captain Douglas R. Wright*

Since 1980, Military Rules of Evidence **311** through **317** have governed military search and seizure law. According to the drafters, the rules represented “a partial codification of the law relating to . . . search and seizure.”¹ Obviously, the “law” referred to was the body of fourth amendment interpretations that the Court of Military Appeals had rendered up to that time. These interpretations generally mirrored the interpretations of the Supreme Court because, nearly two decades prior to the adoption of the Military Rules of Evidence, the Court of Military Appeals had held that the protections in the **Bill** of Rights, as interpreted in the civilian context, should apply to the military to the extent possible.²

The Military Rules of Evidence represent a compromise between specificity and generality.³ They were intended to be specific enough to ensure stability and uniformity within the armed forces, yet, at the same time, general enough to allow for necessary change via case law. For example, Rule **314(k)** provides that searches “of a type not otherwise included in this rule and not requiring probable cause . . . may be conducted when permissible under the Constitution of the United States as applied to members of the armed **forces**.”⁴

Such flexible provisions contemplate what may be called “evolutionary” changes—those that proceed along the established path of fourth amendment development. A “revolutionary” change—one based upon principles that differ from the established

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¹Manual for Courts-Martial, United States, 1984, Military Rules of Evidence analysis, section III, at A22-5 [hereinafter Mil. R. Evid. analysis].

²United States v. Jacoby, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960) (“[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.”).

³Mil. R. Evid. analysis, section III, at A22-5.

⁴Mil. R. Evid. 314(k).

fourth amendment doctrine—would by definition disrupt the theoretical framework of the specific rules.

Such a “revolutionary” doctrine emerged in 1985 in a case where the military was neither involved nor mentioned, but where the basis of the decision had even greater pertinence to the military than to the case at bar. In *New Jersey v. T.L.O.*,⁵ the Supreme Court announced that public school officials, from teachers to principals, could conduct warrantless searches of students upon less than probable cause because of “the substantial interest of teachers and administrators in *maintaining discipline* in the classroom and on school grounds.”⁶

Courts have almost universally relied upon the need for maintaining discipline to justify military “exceptions” to the constitutional requirements imposed in a civilian context.’ In *United States v. Stuckey*,⁸ Chief Judge Everett relied in part upon the need for military discipline⁹ to justify the use of search authorizations issued by military commanders, even though commanders would be unable to function as truly neutral magistrates under the constitutional standards applicable to civilians.¹⁰ By creating a “discipline” exception to the warrant and probable cause requirements of the fourth amendment, the Supreme Court has eliminated the need for military “exceptions” to its interpretations.

⁵105 S. Ct. 733 (1985).

⁶*Id.* at 742.

⁷*See* Rostker v. Goldberg, 453 U.S. 57, 69 n.6 (1981)(quoting S. Rep. No. 826, 96th Cong., 2d Sess. 159-60, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2649); Brown v. Glines, 444 U.S. 348 (1980); Burns v. Wilson, 346 U.S. 137 (1953); Watkins v. United States Army, 721 F.2d 687 (9th Cir. 1983); Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975); Cortright v. Resor, 447 F.2d 245, 252-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); Anderson v. Laird, 437 F.2d 912 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971); Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), *cert. denied*, 396 U.S. 976 (1969); Petrey v. Flaughner, 505 F. Supp. 1087, 1091 n.21 (E.D. Ky. 1981); Huff v. Secretary of the Navy, 413 F. Supp. 863 (D.D.C. 1976), *affd in part, vacated in part on other grounds*, 575 F. 2d 907 (D.C. Cir. 1978), *rev'd on other grounds*, 444 U.S. 453 (1980); Culver v. Secretary of the Air Force, 389 F.Supp. 331 (D.D.C. 1975), *aff'd*, 559 F.2d 622 (D.C. Cir. 1977); Martin v. Schlesinger, 371 F. Supp. 637 (W.D. Ala. 1974); Whitis v. United States, 368 F. Supp. 822 (M.D. Fla. 1974); Talley v. McLucas, 366 F. Supp. 1241 (N.D. Tex. 1973); McWhirter v. Froehle, 351 F. Supp. 1098, 1101 (D.S.C. 1972).

⁸10 M.J. 347 (C.M.A. 1981).

⁹*See generally id.* at 356.

¹⁰*Id.* at 361.

Moreover, in creating the discipline exception, the Supreme Court relied upon inspection¹¹ and stop-and-frisk¹² cases in a way that demonstrates that the various types of fourth amendment intrusions are properly distinguished from one another by the degree of suspicion involved. This raises questions about the wisdom of the military “primary purpose” distinction between searches and inspections. In fact, the test for fourth amendment reasonableness that the Supreme Court derives from its precedents is readily adaptable to inspection situations.

Because of the far reaching implications of the *T.L.O.* doctrine, this article examines how those principles should be implemented in the military. The article examines the development of military search and seizure law and some common misconceptions about that development. It then concludes that the full benefits of *T.L.O.* can only be realized by adopting changes to the Military Rules of Evidence, and proposes some changes.

I. FUNDAMENTALS: INHERENT RIGHTS V. DELEGATED POWERS

Perhaps the best way to understand the present state of the law is to examine its development. This examination requires a knowledge of the fundamental principles that shaped this development.

The fourth amendment does not grant any rights to military personnel because the Constitution does not *confer* “constitutional rights” upon anyone. On the contrary, it merely prohibits government from infringing upon self-existent, or natural rights. Our government is founded on the principle that the fundamental rights of individuals are inherent and inalienable, and that it is the role of government to preserve them.¹³

¹¹See, e.g., *T.L.O.*, 105 S. Ct. at 741 (citing *Camara v. Municipal Court*, 378 U.S. 523 (1967)) *id.* at 740 (quoting *Camara* and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)).

¹²See, e.g., 105 S. Ct. at 744, where the Court applies the fourth amendment reasonableness test articulated in *Terry v. Ohio*, 392 U.S. 1 (1967).

¹³As stated in the Declaration of Independence:

We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed.

The Declaration of Independence para. 2 (U.S. 1776).

The people subordinate their rights only insofar as they delegate power to the government. As Colonel Thomas Hartley explained to the Pennsylvania ratification convention:

As soon as the independence of America was declared, in the year 1776, from that instant all our natural rights were restored to us, and we were at liberty to adopt any form of government to which our views or our interest might incline us. This truth . . . naturally produced another maxim, that whatever portion of those natural rights we did not transfer to the government, was still reserved and retained by the people; for, *if no power was delegated to the government, no right was resigned by the people.*¹⁴

Two examples will illustrate how these principles of popular sovereignty and delegated powers were woven into the fabric of the Constitution to enable the people to "secure the Blessings of Liberty to [them]selves and [their] Posterity."¹⁵ First, if their elected representatives failed to properly protect and preserve their rights, the people could elect new representatives. Second, if the people determined that this elective process did not adequately protect their rights, they could amend the Constitution to more accurately define the scope of the delegated powers.¹⁶

¹⁴"Pennsylvania and the Federal Constitution, 1787-1788, at 289 (J. McMaster & F. Stone eds. 1888)(emphasis added).

¹⁵U.S. Const. preamble.

¹⁶The original Constitution did not contain a bill of rights. The opponents of a bill of rights assured the people that the Constitution was not intended to give the government power to infringe their inherent rights. James Wilson, in the debates in Pennsylvania, expressed fear that a bill of rights would be dangerous because it would imply that anything not listed was subject to the power of the government. He thought that citizens were already adequately protected because, by definition, every act of government intruded upon the rights of the people and could only be justified by reference to one of the specifically delegated powers. 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 435-36 (J. Elliot ed. 1901).

On the other hand, the proponents of a bill of rights felt that the powers delegated to the federal government were so broad that elected representatives could not always be trusted to give proper weight to the rights of the people. They advocated a bill of rights to ensure that the powers of government were not extended too far. The latter view won out, and the Bill of Rights, which included the fourth amendment, was adopted to mark the line beyond which the delegated powers could not be stretched.

The proponents of the Bill of Rights also recognized, however, that a listing of rights could be misconstrued. Therefore, the ninth amendment was included to make it clear that the "enumeration in the Constitution, of certain rights, [was not to] be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Supreme Court has recognized that not all inherent rights are listed in the Constitution. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (per Chief Justice Burger, two Justices concurring and four

Thus the proper balancing of individual rights and government powers was the essence of our constitutional form of government. As James Madison declared

[W]here power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.¹⁷

This essential constitutional principle may be stated as a two-pronged balancing test: the exercise of a government power must be "necessary to the public good," and it must be sufficiently limited in scope to effectively avoid "public detriment."

In the area of search and seizure, the "public good" of ferreting out crime must be balanced against the "public detriment" of unwarranted invasions into personal security, privacy, and property. Obviously, the enforcement of some laws may be more important to the public than the enforcement of others; so the need for some searches may be greater than for others.

On the other hand, some searches may intrude much further upon individual rights than others, thereby causing greater public detriment. For instance, the "public detriment" from an unwarranted examination of a person's body cavities would be infinitely greater than from a brief but unwarranted detention.

Every balance requires a fulcrum in order to function. The balance that weighs search and seizure power against individual rights hinges upon the degree of suspicion prompting the government to conduct a given search. Searches are generally motivated by a desire to discover whether there has been a violation of law. But that desire alone cannot justify intruding upon an individual's inherent liberty, property, and privacy rights. The intrusion can only be justified if the level of suspicion is legally adequate.

Arguably Congress could have defined this balance in the military context by exercising its power to regulate the land and naval forces.¹⁸ It has never done so, however.¹⁹

Justices concurring in the judgment); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁷The *Federalist* No. 41 (J. Madison).

¹⁸U.S. Const. art. I, § 8, cl. 14.

¹⁹Military search and seizure law remained part of military common law until it was written into the Manual for Courts-Martial in 1949. In the few instances where Congress gave the military statutory authority to conduct searches and

Instead, the first Congress approved and submitted to the states the balancing pattern embodied in the fourth amendment.²⁰ The amendment requires that the government's suspicion be based upon reliable information given under oath or affirmation,²¹ that a neutral magistrate gauge the degree of suspicion raised by that information,²² and that the degree of suspicion rise to the level of "probable cause" before a warrant can be issued.

Nevertheless, the Supreme Court has interpreted the amendment to require different balancing patterns in different circumstances,²³ especially where significantly different degrees of interest have been involved on either side.²⁴ Yet, as we shall see, these fourth amendment patterns have never been fully integrated into the unique military context.

11. THE ORIGINAL BALANCE

A. *FOURTH AMENDMENT LIMITS ON MILITARY POWER*

The available evidence indicates that the fourth amendment was not originally intended to limit the power of the government to control the armed forces.

In 1957 Justice Black remarked in *Reid v. Covert*²⁵ that "as yet it has not been clearly settled to what extent the Bill of Rights . . . applies to military trials."²⁶ This dicta prompted two Harvard Law Review articles—the first claiming that the founders had

seizures, the power was granted to help enforce the civil laws, and equal power was given to civilian officials. *See, e.g.*, Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (allowing surveyors, collectors and naval officers to search ships for smuggled goods); Act of May 6, 1822, ch. 58, § 2, 3 Stat. 682, 682 (allowing Indian agents and military commanders to search for liquor in Indian country).

²⁰*See* W. Skousen, *The Making of America* 226 (1985).

²¹*See, e.g.*, *Payton v. New York*, 495 U.S. 573 (1980) (detailed discussion of background of fourth amendment); *Aguilar v. Texas*, 378 U.S. 108 (1964) (reliability).

²²*See, e.g.*, *United States v. United States District Court*, 407 U.S. 297 (1972); *Jones v. United States*, 362 U.S. 257 (1960); *Johnson v. United States*, 333 U.S. 10 (1948).

²³*Compare, e.g.*, *Aguilar v. Texas*, 378 U.S. 108 (1964) (adding reliability test to probable cause requirement for obtaining warrant) *with* *Camara v. Municipal Court*, 387 U.S. 523 (1967) (relaxing probable cause requirement for obtaining warrant).

²⁴*Compare, e.g.*, *Rochin v. California*, 342 U.S. 165 (1952) (shocking intrusion voids conviction based on otherwise admissible evidence) *with* *Terry v. Ohio*, 392 U.S. 1 (1967) (safety of police justifies dispensing with warrant and probable cause requirements).

²⁵354 U.S. 1 (1957).

²⁶*Id.* at 37.

intended the **Bill** of Rights to apply to the military,²⁷ and a rebuttal demonstrating that the founder's actions did not show such an intent.²⁸

Although they disagreed about the Bill of Rights in general, both authors declared that the warrant requirement of the fourth amendment had not been meant to apply to the military.²⁹ Until the Supreme Court decided *Boyd v. United States*³⁰ in 1886, the fourth amendment had no other dimension; it offered only the protection of the common law warrant requirement—that a judicial officer must assess the degree of suspicion and find it adequate before authorizing a search.

Neither author discussed what it meant to say that the fourth amendment did not “apply to the military.” Such a statement necessarily had two dimensions because the amendment is a two-edged sword; it acts to limit governmental authority and also to protect individual rights. If the amendment had not been meant to apply at **all** when the government exercised its military power, it would mean that the government could use its military authority to make warrantless arrests or searches of *anyone*. By the same token, if the amendment had not been meant to apply at **all** to the individual rights of military personnel, it would mean that *anyone*, including civilian authorities, could search or arrest **a** soldier without a warrant.

The early cases teach that neither extreme was intended. In *Ex parte Merryman*,³¹ decided in 1861, an Army general, acting under the President's direction, ordered military personnel to arrest a civilian suspected of treason. Chief Justice Taney held that despite specific authorization from the Commander in Chief, “[a] military officer has no right to arrest and detain a person *not subject to the rules and articles of war*”³² without a judicial warrant. The court explained that otherwise the President would control military power independent of and superior to civil authority.

²⁷Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

²⁸Wiener, *Courts-Martial and the Bill of Rights: The Original Practice, Parts I and II*, 72 Harv. L. Rev. 1, 266 (1958).

²⁹Compare Henderson, *supra* note 26, at 315, with Wiener, *supra* note 27, at 271.

³⁰In *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court ruled that it was a violation of the fourth and fifth amendments to force a person to either produce documents under a subpoena duces tecum or admit the prosecutor's assertions of what the documents contained.

³¹17 F. Cas. 144 (C.C.D.Md. 1861) (No. 9,487).

³²*Id.* at 147 (emphasis added).

This was considered so dangerous that when the King of England had attempted it, the colonists had listed this as an express justification for the Declaration of Independence.³³ So, unless the President acted against someone within his "chain of command," he was just as bound by the warrant requirement when acting as the Commander in Chief as when he acted as the Chief Executive.

In 1912 this rationale was applied again in *Ex parte Orozco*.³⁴ There the President authorized military authorities to arrest Colonel Orozco, an officer in the Mexican revolutionary forces, who was then in Texas engaging in activities suspected of violating United States neutrality laws. When Orozco petitioned for habeas corpus, the government argued that the President had acted under statutes directing him to use military force to prevent the use of United States territory as a staging area.

The court saw no difference between this case and *Merryman*.³⁵ It found no exigent circumstances that would justify a warrantless arrest and ruled the warrantless arrest by military officers invalid. Because Orozco was charged only with violating the neutrality laws, he was not subject to the military law of the United States. Despite his military status and military activity, he was neither a prisoner of war nor otherwise triable by court-martial for any offense.

As a result, the fourth amendment protected him from a warrantless military arrest authorized by the President, even when acting under statute, as much as it would have protected anyone else who was not strictly within the Commander in Chief's chain of command.³⁶ Neither the congressionally directed military

"Chief Justice Taney noted—

The Constitution of the United States is founded upon the principles of government set forth and maintained in the Declaration of Independence. In that memorable instrument the people of the several colonies declared, that one of the causes which "impelled" them to "dissolve the political bands" which connected them with the British nation, and justified them in withdrawing their allegiance from the British sovereign, was that "he (the king) had affected to render the military independent of, and superior to, the civil power."

Id. at 152 n.3.

³⁴201 F. 106 (W.D. Tex. 1912).

³⁵*Id.* at 109.

³⁶*Id.* at 117 ("The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 120, 121 (1866)). Nevertheless, in *Milligan* the Court had also said that "the power of Congress, in the government of the land and naval

functions involved, nor Orozco's status as a military officer justified abandoning the fourth amendment pattern.

These cases established that the federal military power was only meant to be greater than the federal civil power when employed to control the military itself.

The 1885 case of *Kurtz v. Moffitt*³⁷ established that military members did not lose fourth amendment protections because of their military status. To the contrary, the Court found that a soldier was entitled to ~~full~~ fourth amendment protection in criminal investigations conducted solely by civilian law enforcement authorities. In *Kurtz* a deserter from the Army was arrested without a warrant by civilian police. The Supreme Court not only acknowledged that military officers could have arrested him lawfully without a warrant, but suggested that even civilians could have done so *if* acting upon military orders.³⁸

Nevertheless, the Court found no military authorization and ruled the arrest invalid. This case established that although a soldier had no protection from warrantless arrests by military authorities, he was fully protected from a warrantless arrest by civilians.

The notion that the fourth amendment did not originally protect those with military status is therefore incorrect. It **is** more accurate to say that the only time the amendment did not protect a service member was when the arresting or searching officer acted under color of military authority.

This distinction implies that the sole purpose for abandoning the protections of the fourth amendment in the military was to preserve military discipline and effective command. It was the weight of the government's interest in military discipline that made the difference. Where there was no command relationship, and hence no special need for military discipline, the ~~full~~ protection of the fourth amendment always applied.

B. THE REASONABLENESS STANDARD OF THE MILITARY COMMON LAW

Despite the absence of fourth amendment protections for intra-military searches and seizures, the authority of the military

forces, and of the militia, **is** not at **all** affected by the fifth or any other amendment." 71 U.S. (4 Wall.) at 123.

³⁷115 U.S. 487 (1885).

³⁸*Id.* at 504-05.

was not unlimited. In fact, the military standard was not very different from the standard applied in civilian cases:³⁹ a “reasonable belief” standard was applied to the military for both searches and seizures.

In *Luther v. Borden*,⁴⁰ decided in 1849, Chief Justice Taney held that, under martial law,⁴¹ military officers could without a warrant “arrest anyone, who, from the information before them, they had reasonable *grounds* to believe was engaged” in insurrection, **and** that they could likewise “order a house to be forcibly entered and searched, when there were reasonable grounds *for supposing* he might be there concealed.”⁴²

Winthrop indicates that the common law rules of citizen’s arrest governed arrests of soldiers by military personnel other than the accused’s commanding officer.⁴³ Even the commander was limited to acting upon a standard of reasonable belief:

It is sufficient that knowledge of the offence be had by the [commanding] officer making the arrest because of its having been committed in his presence, or, where this is not the case, that an accusation be seriously made, orally or in writing, by a responsible person and communicated to such officer.⁴⁴

This common law requirement of reasonable belief to support an arrest continued right up through the time that the term “apprehension” was adopted to distinguish taking a suspect into custody from imposing continuing restraint, as was customarily done upon arrest. Article 7 of the Uniform Code of Military

³⁹*See, e.g.,* *Stacey v. Emery*, 97 U.S. 642, 645 (1878) (probable cause is a “reasonable ground” of suspicion); *accord* *Brinegar v. United States*, 338 U.S. 160, 175 (1948) (“The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” [citations omitted]).

⁴⁰48 U.S. (7 How.) 1 (1849).

⁴¹If martial law cannot legally be declared, the protections of the Bill of Rights generally cannot be circumvented. *Ex Parte Milligan* 71 U.S. (4 Wall.) 2 (1866). But compare *United States v. Bollman*, 24 F. Cas. 1189 (C.C.D.C. 1807) (**No.** 14, 622) (Cranch, C.J., dissenting) (stating that the fourth amendment barred issuing an arrest warrant where there was no probable cause, even though the suspect was already in military custody) *with* *Schenk v. United States*, 249 U.S. 47, 52 (1919) (stating that “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort . . . that no Court could regard them as protected by any constitutional right.”)

⁴²48 U.S. (7 How.) at 46 (emphasis added).

⁴³W. Winthrop, *Military Law & Precedents* *160 (2d ed. 1896 & reprint 1920). Winthrop stated that an officer, or a noncommissioned officer, could arrest soldiers who were participating in “quarrels, frays, and disorders in their presence.” *Id.*

⁴⁴*Id.* at 152.

Justice⁴⁵ merely codified this long standing practice⁴⁶ that apprehension be based “upon reasonable belief that an offense has been committed and that the person apprehended committed it.”

Nevertheless, the reasonable belief requirement of military common law was not necessarily equivalent to the reasonableness requirement of the fourth amendment. The amendment required that the entire search be reasonable, not just the underlying suspicion. It also required that the initial suspicion amount to “probable cause” before a warrant could be issued.

These distinctions could have resulted in the development of a balancing pattern for the military based on military reasonableness, and another pattern for civilians based on warrants and probable cause. But two important influences propelled both military and civilian search and seizure law along similar paths.

III. FORCES PROMPTING THE MILITARY TO APPLY CIVILIAN SEARCH AND SEIZURE RULES A. *REFORMERS*

The most significant factor that influenced military search and seizure law to follow fourth amendment developments in the civilian sector was the efforts of reformers within the military to bring military justice on a par with civilian justice. During World War I, General Samuel Ansell became the Acting Judge Advocate General of the Army. In 1918, shortly after taking office, he initiated the first board of review.⁴⁷ He also authored a bill introduced by Senator Chamberlain in 1919 that was designed to limit command control of courts-martial, provide lawyers as counsel, introduce civilian-like rules of evidence and procedures, and provide a complex system of appellate review.⁴⁸

In a letter to General Leonard Wood, Ansell wrote, “Never again can or will we fight a great war with **an** Army of American citizens subject to a system of discipline that was designed for the Government of the professional military serf of another

⁴⁵Uniform Code of Military Justice art. 7, 10 U.S.C. § 807 (1982) [hereinafter UCMJ]; *see also* Manual for Courts-Martial United States, 1951, para. 19a [hereinafter MCM 1951]; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 302(c).

⁴⁶*See* F. Wiener, *The Uniform Code of Military Justice* 54 (1950).

⁴⁷W. Generous, *Swords and Scales* 6 (1973).

⁴⁸*Id.* at 9.

age.”⁴⁹ This spirit of reform eventually resulted in the 1920 Articles of War, which, although they did not go nearly as far as General Ansell would have liked, made substantial improvements in the court-martial system.⁵⁰

Later reformers continued to make improvements. In his book *Swords and Scales*, William Generous traces the changes in the military justice system from General Ansell's efforts through the Military Justice Act of 1968 and concludes that “the military has frequently criticized its own court-martial methods, sought solutions to the problems it found, and then altered the system in an apparently enlightened way.”⁵¹

Military reformers were instrumental in writing⁵² the Uniform Code of Military Justice (UCMJ) enacted in 1950.⁵³ The Court of Military Appeals, established by that act, held in one of its earliest cases that the statute was “intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice.”⁵⁴ More recently, in the Military Justice Act of 1983, Congress amended the UCMJ to allow the Supreme Court to review Court of Military Appeals decisions on direct petition for writ of certiorari.⁵⁵

This overall trend to establish a military justice system consistent with civilian concepts of justice is understandable. It seems only natural that upon entering military service American citizens would desire to maintain as far as possible the rights protected by the Constitution they were pledging their lives to “support and defend.”

Nevertheless, the commander's roles as leader, inspector, administrator, and disciplinarian have made it very difficult to fit him or her into the generally applicable fourth amendment pattern.

B. THE RELEVANCE OF THE EXCLUSIONARY RULE

Notwithstanding the need for commanders to ensure good order, discipline, and fitness for duty, those striving for reform of

⁴⁹New York Times, Aug. 4, 1919, at 2, col. 4.

⁵⁰Act of June 4, 1920, ch. 227, 41 Stat. 787.

⁵¹W. Generous, *supra* note 47, at 4.

⁵²*See generally id.* at 34-53.

⁵³UCMJ arts. 1-140.

⁵⁴United States v. Clay, 1 C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

⁵⁵Military Justice Act of 1983, Pub. L. No. 98-209, sec. 10, 97 Stat. 1393, 1405-06 (amending 28 U.S.C. § 1259 and 10 U.S.C. §§ 806, 807, 870).

the military justice system brought about the implementation of many civilian rules. For military search and seizure law this included the rise of the exclusionary rule to remedy fourth amendment violations. Both its fifth amendment underpinnings and its development as rule of evidence destined it to be adopted by the military.

When the Supreme Court first ruled that illegally obtained evidence was inadmissible, it held that the fifth amendment mandated the exclusion. In 1886, in *Boyd v. United States*,⁵⁶ the Court declared:

[T]he “unreasonable searches and seizures” condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment . . . And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.⁵⁷

The inherent right of military personnel to be free from compulsory self-incrimination has been protected under every military code since the Continental Articles of War of 1786.⁵⁸ This right was considered part of the “common law military,”⁵⁹ and until 1916 the military prosecutor himself had the duty to “object to . . . any question to the prisoner the answer to which might tend to criminate **himself**.”⁶⁰ Thus the justification for excluding evidence traced to the inherent rights⁶¹ that military

⁵⁶116 U.S. 616 (1886).

⁵⁷*Id.* at 633.

⁵⁸See W. Winthrop, *supra* note 43, at *291. The 1786 provision is quoted in *United States v. Jacoby*, 11 C.M.A. 428, 436, 29 C.M.R. 244, 252 (1960) See also Act of April 10, 1806, ch. 20, art. 69, 2 Stat. 359, 367, amended by Act of June 22, 1874, ch. 5, § 1342, art. 90, 18 Stat. 228, 238 [hereinafter 1874 Articles of War]. The self-incrimination provisions were further amended by the Act of Aug. 29, 1916, ch. 418, § 1342, art. 24, 39 Stat. 650, 654 and the Act of June 4, 1920, ch. 227, subch. 2, art. 24, 41 Stat. 759, 792 [hereinafter 1920 Articles of War] and were replaced by UCMJ art. 31 in 1950.

⁵⁹Dig. Ops. JAG 1901 para. 1020 (July 1985) (“The principle of the Vth Amendment to the Constitution, but not the amendment itself, applies to courts-martial trials as a part of our common law military.”).

⁶⁰1874 Articles of War, art. 90.

⁶¹Dig. Ops. JAG 1912 *Discipline*, para. X.H.1., at 526 (Dec. 1864) (“[T]he privilege *recognized by the common law*, of a witness to refuse to respond to a question, the answer to which may incriminate him, is a personal one...” (emphasis added)).

authorities were expressly obligated to protect.⁶²

Furthermore, the military relied on federal evidence law as a model for courts-martial rules of evidence. From very early on, military courts generally followed the rules of evidence applied in federal criminal trials⁶³ although courts-martial were allowed to be less technical when the interests of justice required.⁶⁴ Winthrop states that departures from the established civilian rules were rare exceptions.⁶⁵

The 1920 amendments to the Articles of War placed even more emphasis on following the rules of evidence applied in federal courts. Article 38 declared that the President "shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States."⁶⁶ This provision was implemented in the 1921 Manual for Courts-Martial which, although it did not discuss searches, declared that its rules of evidence formed "the only binding rules, except such rules of evidence as are expressly prescribed . . . in the Federal Constitution."⁶⁷

At that time, the evidentiary aspects of the fourth amendment were just beginning to develop. Only a few cases involving fourth amendment issues had reached the Supreme Court during the nineteenth century.⁶⁸ Congress had not yet exercised the limited criminal jurisdiction of the federal government except in minor instances. Therefore, the Supreme Court had made no in-depth analysis of the fourth amendment until it decided *Boyd* in 1886.

⁶²*See, e.g.*, CM 129804, Jones, May 20, 1919; CM 128735, Soldier, April 23, 1919; CM 108428, Hamilton, Jan. 5, 1918; *all cited in* Manual for Courts-Martial, United States, 1921, para. 233 [hereinafter MCM 1921]; Dig. Ops. JAG 1912 *Discipline* para. X.H.2., at 526 (13 Mar. 1909); Dig. Ops. JAG 1901, para. 1020 (July 1985); Dig. Ops. JAG 1912 *Discipline* para. X.H.1.a., at 526 (Jan. 1890); Dig. Ops. JAG 1912 *Discipline* para. X.H.1., at 526 (Dec. 1864).

⁶³W. Winthrop, *supra* note 43, at *443; *see also* Manual for Courts Martial, United States, 1921, para. 198 [hereinafter MCM 1921]; E. Dudley, Military Law and the Procedures of Courts-Martial para. 547, at 246 (3d ed. 1912); Dig. Ops. JAG 1912 *Command*, para. XI.A.1., at 528-29 (Dec. 1869).

⁶⁴*See, e.g.*, MCM 1921, para. 198.

⁶⁵W. Winthrop, *supra* note 43, at *443.

⁶⁶1920 Articles of War, art. 38.

⁶⁷MCM 1921, para. 198. See the subsequent equivalent provision at MCM 1951, para. 137 and MCM, 1969, para. 137.

⁶⁸*E.g.*, *In re Jackson*, 96 U.S. 727 (1877); *Murray v. Hoboken Land Co.*, 59 U.S. (18 How.) 272 (1855); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806).

After *Boyd*, federal search and seizure law continued to develop very slowly.⁶⁹ It was 1914 before the Supreme Court decided *Weeks v. United States*,⁷⁰ which originated the exclusionary rule. Thereafter, as the federal courts began to develop fourth amendment law on the basis of objections to evidence, the military grew even more closely tied to federal evidence rulings, including those based on the Constitution.

IV. DRAWING UPON CIVILIAN RULES TO DEVELOP MILITARY SEARCH AND SEIZURE LAW

A. THE ADOPTION OF THE EXCLUSIONARY RULE BY THE MILITARY

Some writers have presumed that the military was reluctant to adopt the exclusionary rule⁷¹ because the rule did not expressly appear in the Manual for Courts-Martial until 1949.⁷² This conclusion is unwarranted.

Boyd v. United States was based on the fifth amendment and common law principles.⁷³ It rested upon the common law "mere evidence" rule—that a search could only be conducted for "tools" or "fruits" of a crime, and not merely for incriminating information.⁷⁴ The court focused on the goal of the search, not its reasonableness.

⁶⁹By 1937 the Supreme Court had only interpreted the fourth amendment a total of about seventy times. N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 106 (1937).

⁷⁰*Weeks v. United States*, 232 U.S. 383 (1914).

⁷¹*See, e.g.*, J. Munster & M. Larkin, *Military Evidence* § 9.1, at 416-17 (1959); Comment, *The Fourth Amendment Warrant Requirement and Courts-Martial: Military Justice versus Military Readiness*, 8 Am. J. Crim. L. 281, 284-85 (1980).

⁷²*See* Manual for Courts-Martial, United States Army, 1949, para. 138; Manual for Courts-Martial, United States Air Force, 1949, para. 138.

⁷³116 U.S. at 630 ("[I]t is the invasion of his indefeasible right of personal security, personal liberty and private property . . . which underlies Lord Camden's judgment. . . . [A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.").

⁷⁴*See, e.g.*, R. Everett, *Military Justice in the Armed Forces of the United States* 98 (1956) (stating that only "tools of crime" and "fruits of crime" can be searched for and seized); *see also Harris v. United States*, 331 U.S. 145 (1947); *United States v. Alaniz*, 9 C.M.A. 533, 26 C.M.R. 313 (1958); *United States v. Marelli*, 4 C.M.A. 276, 15 C.M.R. 276 (1954) (detailing history of the rule); *United States v. Elliot*, 16 C.M.R. 882 (A.F.B.R. 1954). The "mere evidence" rule was replaced with a nexus standard by *Warden v. Hayden*, 387 U.S. 294 (1967).

Eight years after *Boyd*, the Supreme Court declared that even an unreasonable search and seizure did not make evidence inadmissible.⁷⁵ The Court again based its decision on the common law, this time invoking the rule that a court should not inquire at trial into a collateral issue, such as how a witness came into possession of otherwise admissible evidence.⁷⁶

The landmark *Weeks* decision limited the collateral issue rule but did not overrule it. The Court merely held that a petition before trial for the return of illegally seized property did not present a collateral issue.⁷⁷ Accordingly, it found that the district court's refusal to return the illegally seized property was unconstitutional.⁷⁸ Because this decision allowed the petitioner to retrieve evidence from the prosecution, *Weeks* is usually cited as the origin of the exclusionary rule. It is important to recognize, however, that the rule arose in a pretrial hearing.

It was not until 1921, in *Gouled v. United States*,⁷⁹ that the Supreme Court sustained a motion made *at trial* to suppress illegally seized evidence. There the civilian defendant did not know until his papers were offered in evidence that an Army private, acting under official orders, had surreptitiously seized them while a guest in his home. The defendant had had no opportunity to make a pretrial motion that would avoid the collateral issue. The court reasoned that to allow such use of unlawfully seized evidence would violate the fifth amendment's prohibition against compulsory self-incrimination.

The Supreme Court relied upon the fifth amendment again in 1925, in *Agnello v. United States*,⁸⁰ where it held that before trial a defendant could invoke his right to avoid self-incrimination by objecting to the use of illegally seized evidence without having to apply for the return of the seized items.

These cases show that the primary reason for excluding illegally obtained evidence at the time of trial was the fifth amendment prohibition against compulsory self-incrimination.⁸¹

⁷⁵*Adams v. New York*, 192 U.S. 585 (1903).

⁷⁶*Id.* at 579.

⁷⁷*United States v. Weeks*, 232 U.S. 383, 396 (1914).

⁷⁸*Id.* at 398.

⁷⁹255 U.S. 298 (1921).

⁸⁰269 U.S. 20 (1925).

⁸¹The military led the way in protecting an accused person from self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436, 489 & n.62 (1966), the Supreme Court cited Article 31, **UCMJ**, and adopted its approach of excluding confessions made without a rights advisement. The 1921 Manual for Courts-

The cases also show that the collateral issue rule remained an important consideration for a long time. In 1937, when Mr. Lasson published his authoritative history of the fourth amendment, he stated that "the collateral issue rule still stands."⁸²

In fact, it was still enough of a concern that the 1951 Manual for Courts-Martial included the following provision: "Military courts have no authority to order a return to the accused of illegally seized property . . . Consequently, an objection to the use of evidence on the ground that it was illegally obtained . . . is properly made at the time the prosecution attempts to introduce the evidence."⁸³

Prior to this provision the government arguably could have relied upon the collateral issue rule to overcome such an objection. Because of this procedural posture, it is easy to see why the *Weeks* rule could not be applied in courts-martial when it was first announced. Nevertheless, the military was not slow to adopt an exclusionary rule.

As late as 1927, the Supreme Court reaffirmed that a defendant who knew of a seizure could not raise a collateral issue by alleging for the first time at trial that the search and seizure were illegal.⁸⁴ Nevertheless, the Navy had adopted an exclusionary rule in 1922,⁸⁵ and by 1924 the Army had done the same.⁸⁶ They may have done so because of the Army's involvement in the *Gouled* case in 1921, especially as that decision grounded exclusion on the fifth amendment.⁸⁷

Whatever the reason, the military obviously was not opposed to adopting the remedy of excluding illegally seized evidence. The

Martial had clearly stated the rule excluding unwarned confessions and had cited even earlier cases. MCM 1921, para. 225.

This instance illustrates that the military has not been reticent in protecting the inherent rights of military personnel. Moreover, it shows that where necessary, military law has gone further than civilian law "to guard as effectually as possible against a perversion of [government] power to the public detriment." The Federalist No. 41 (J. Madison). The military recognized that in this area its greater power warranted greater protections.

⁸²N. Lasson, *supra* note 69, at 113.

⁸³MCM, 1951, para. 152.

⁸⁴*Seguro v. United States*, 275 U.S. 106 (1927); see also *McDaniel v. United States*, 294 F. 769 (1924).

⁸⁵J. Munster & M. Larkin, *Military Evidence* § 9.1., at 417 (1959).

⁸⁶Dig. Ops. JAG 1912-1940 para. 395(27) (1924).

⁸⁷In 1921 Congress passed a statute authorizing the punishment of those who conducted warrantless searches in connection with the National Prohibition Act. One pair of writers speculated that this enactment prompted the military to adopt an exclusionary rule. J. Munster & M. Larkin, *Military Evidence* § 9.1, at 417 (1959).

services actually adopted an exclusionary rule free of any need to demand the return of illegally seized evidence before *Agnello* clarified for civilians that such a demand was unnecessary.

Be generally applying the rules of evidence used in federal district courts, and especially by adopting the civilian pattern of excluding illegally obtained evidence, the military practically invited courts to analyze military search and seizure rules in the same way that they examined civilian rules. In fact The Judge Advocate General began to discuss the legality of searches and seizures in terms of whether the entire procedure was reasonable.⁸⁸

B. A SEPARATE STANDARD OF REASONABLENESS

Nevertheless, the military determined reasonableness in its own way. For example, in 1930 a command-authorized search of an on-post family dwelling was held to have been reasonable because it was a search of "public quarters" authorized "in conformity with military law."⁸⁹

The use of a military standard separate from the general constitutional standard had been condoned by the Supreme Court in 1911. In *Reaves v. Ainsworth*⁹⁰ the Court had declared that "to those in the military or naval service of the United States the military law is due process."⁹¹ This "separate standard" approach was accepted until 1938 when the Supreme Court announced, in *Johnson v. Zerbst*,⁹² that the federal courts could review constitutional issues in military habeas corpus cases.

Once the federal courts were free to do so, they began to hold that the protections afforded by the Bill of Rights, with the exception of grand and petit juries, extended to military person-

⁸⁸See generally CM 209952 (1938); CM 196526 (1931); CM 250.413 (23 July 1930); CM 161760 (1924); as digested in Dig. Ops. JAG 1912-1940 § 395(27).

⁸⁹CM 250.413 (23 July 1930), as digested in Dig. Ops. JAG 1912-1940 § 395(27).

⁹⁰219 U.S. 296 (1911).

⁹¹*Id.* at 304.

⁹²304 U.S. 458 (1938). Until the Military Justice Act of 1983, the federal courts could entertain only collateral attacks on court-martial convictions. And prior to *Johnson v. Zerbst* the scope of review extended only to "whether the court-martial had exceeded its jurisdiction. Thus it was virtually impossible for one subject to military jurisdiction to obtain an adjudication in the civil courts of his allegations that a court-martial had infringed his constitutional rights." Henderson, *supra* note 27, at 294. See generally Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5 (1985).

nel.⁹³ Subsequent developments in fourth amendment law contained the potential for significant change in the military system.

In 1948 the Supreme Court explained, in *Johnson u. United States*,⁹⁴ that only a neutral magistrate could constitutionally assess the adequacy of the suspicion justifying a search. The Court stated that the fourth amendment required “that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer”⁹⁵ seeking a warrant. The following year, in *Wolf v. Colorado*,⁹⁶ the Supreme Court extended the fourth amendment beyond its traditional scope to protect citizens against the actions of state, as well as federal officials.

If the civilian courts had continued the trend by holding that military personnel were entitled to have search authorizations made by a truly neutral official, military search and seizure law would have developed much differently than it did. But within two years after *Johnson v. United States*, several things happened to prevent a direct confrontation between the military standards and the requirements of the fourth amendment.

C. MILITARY DUE PROCESS

1. Modeling Military Reasonableness After the Constitutional Standard

The first thing that prevented the civilian courts from applying *Johnson* to the military was that civil court authority to review constitutional questions in military cases was abruptly curtailed. In 1950 the Supreme Court decided *Hiatt u. Brown*⁹⁷, where it reversed itself and held that civil habeas corpus review of courts-martial should extend only to determining whether the court-martial had jurisdiction and not to other constitutional questions. It was for Congress to balance individual rights against military power.

⁹³*E.g.*, *Bums v. Lovett*, 202 F.2d 335 (D.C. Cir. 1952), *aff'd sub nom.* *Burns v. Wilson*, 346 U.S. 137 (1953); *Powers v. Hunter*, 178 F.2d 141 (10th Cir. 1949), *cert. denied*, 339 U.S. 986 (1950); *United States ex rel. Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944); *Shita v. King*, 133 F.2d 283 (8th Cir. 1943); *Sanford v. Robbins*, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941); *see Henry v. Hodges*, 171 F.2d 401, 403 (2d Cir. 1948) (dictum), *cert. denied*, 336 U.S. 968 (1949); *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).

⁹⁴333 U.S. 10 (1948)

⁹⁵*Id.* at 13-14 *quoted in* *Illinois v. Gates*, 462 U.S. 213, 240 (1983).

⁹⁶338 U.S. 25 (1949).

⁹⁷*Hiatt v. Brown*, 339 U.S. 103 (1950).

The second thing was that in 1950 Congress also enacted the Uniform Code of Military Justice, which established the Court of Military Appeals,⁹⁸ and provided substantial protections to the rights of military personnel. Perhaps underlying *Hiatt's* deference to Congress was the recognition that Congress was endeavoring to protect the rights of military personnel.⁹⁹

Early in its first term, the Court of Military Appeals declared that, by enacting the Uniform Code, "Congress intended, *in so far as reasonably possible*, to place military justice on the same plane as civilian justice.¹⁰⁰ The court therefore applied constitutional due process rules, proclaiming, "We can see no good reason why the principles announced in the foregoing [Supreme Court] cases should not be transplanted into the military system; and, *in so far as applicable to our system*, we adopt them."¹⁰¹

Although this expansive language evidenced great respect for the Supreme Court's constitutional rulings, the "in so far as possible" reservation made it clear that the Court of Military Appeals still considered the rights of military personnel to be protected primarily by military law rather than by constitutional law. In doing so, the court implicitly relied upon the former rule that a separate military standard was constitutionally permissible.

Nevertheless, the court conceived the individual rights protected under the Uniform Code "to mold into a pattern *similar* to that developed in federal civilian cases."¹⁰² The court labelled that pattern "military due process," but held that "in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution."¹⁰³

Paragraph 152 of the 1951 Manual for Courts-Martial contained a similar reservation. It was primarily a list of search and seizure rules that, according to one authority, "were intended to be nothing more nor less than a statement of the existing rules which were well established by federal decisions."¹⁰⁴ But paragraph 152 concluded by stating that "searches made by military personnel in the areas outlined above" were still lawful

⁹⁸UCMJ art. 67.

⁹⁹In 1948 Congress had enacted the Elston Act, ch. 625, 62 Stat. 604 (1948), which was the precursor to many of the protections included in the UCMJ.

¹⁰⁰*United States v. Clay*, 1 C.M.A. 74, 78, 1 C.M.R. 74, 78 (1951).

¹⁰¹*Id.* at 79, 1 C.M.R. at 79 (emphasis added).

¹⁰²*Id.* at 77 (emphasis added).

¹⁰³*Id.*

¹⁰⁴J. Munster & M. Larkin, *Military Evidence* § 9.1, at 417 (1959); see also *United States v. Dupree*, 1 C.M.A. 665, 667, 5 C.M.R. 93, 95 (1952) ("[p]aragraph 152 . . . is clearly derived from a similar principle obtaining in the federal courts.")

“when made in accordance with military custom.”¹⁰⁵

The result was a commitment to follow the generally applicable constitutional standards of reasonableness established in civilian search and seizure cases, but only “in so far as possible.” The reservations announced by the court and stated in the 1951 Manual recognized that military authority was generally unrestricted by the Bill of Rights. The court could, if necessary, still use customary military law instead of the generally applicable constitutional standards as the pattern for balancing government power against individual rights.

2. *Two-Tiered Analysis.*

The early “military due process” cases showed a clear effort to apply civilian constitutional standards while reaffirming that military law, and not the fourth amendment, protected the rights of military personnel. This effort resulted in a two-tiered analysis illustrated by *United States v. Florence*.¹⁰⁶ There, the Court of Military Appeals explained why it upheld a commander’s search authorization:

We are attempting to carry out the congressional intent to grant to military personnel, whenever reasonably possible, the same rights and privileges accorded civilians. Accordingly, we have elected to determine if this search, tested by civilian practice would be condemned as being unreasonable. If not, it would not, a fortiori, be unreasonable under military law.¹⁰⁷

Even if the search was unreasonable according to civilian standards, however, it could still be upheld under paragraph 152 of the 1951 Manual. The reason, according to the court, was that

as there is in the Manual for Courts-Martial no requirement for the affidavit of probable cause required by civil statute, an appropriate commanding officer’s exercise of discretion in authorizing a particular search is the acceptable substitute and cannot ordinarily be questioned.¹⁰⁸

¹⁰⁵MCM 1951, para. 152. Winthrop defines custom as follows, “[I]t is laid down by the authorities that it must consist of a uniform, known practice of long standing, which is also certain and reasonable, and is not in conflict with existing statute or constitutional provisions.” W. Winthrop, *supra* note 43, at *44-45.

¹⁰⁶1 C.M.A. 620, 5 C.M.R. 48 (1952).

¹⁰⁷*Id.* at 623, 5 C.M.R. at 50-51.

¹⁰⁸*Id.*

Thus the first tier of analysis was to test a search by the fourth amendment standards generally applied in civilian cases. If it did not pass muster, the court would then test it against the military standards set out in the Manual for Courts-Martial. Accordingly, the military standards began to be viewed as "exceptions" to the generally applicable constitutional rules.¹⁰⁹

Furthermore, such exceptions tended to be limited to the codified provisions of military law. Mr. Robinson O. Everett, who later became the court's Chief Judge, observed in 1956 that:

According to the Manual for Courts-Martial, a search may permissibly be conducted in accordance with military custom. The trouble arises in knowing exactly what falls within military custom. Probably the exemplar of this type of search is the "shakedown inspection" to which a serviceman quickly becomes accustomed.¹¹⁰

Thus even customary inspections fell within the Manual search provisions. In 1969 Chief Judge Quinn wrote a law review article that confirmed that the Manual was the basis for several firmly-established "exceptions."¹¹¹ For example, he recounted that "the Manual [was] silent as to whether the application for authority to search must be in writing. In view of the omission, it was concluded that an oral application was valid. . . . Also . . . the Manual [did] not require that the application be upon oath or **affirmation**."¹¹² He also noted that the Manual allowed a commander to delegate his power to order a search.¹¹³

3. A Preference for Civilian Constitutional Standards.

These military exceptions did not result from an interpretation of the fourth amendment. At that time the Constitution was thought to allow separate military standards. But, because of its interpretation of congressional intent, the Court of Military Appeals adopted a clear preference for incorporating constitutional rules into the statutory rights in the Uniform Code. In *United States v. Clay* the court had proclaimed that military

¹⁰⁹See, e.g., *United States v. Sutton*, 3 C.M.A. 220, 222-23, 11 C.M.R. 220, 222-23 (1953) ("the Uniform Code of Military Justice as the source and strength of military due process."); *United States v. Rhodes*, 3 C.M.A. 73, 11 C.M.R. 73 (1953).

¹¹⁰R. Everett, *supra* note 74, at 103; cf. *United States v. Rhodes*, 8 C.M.R. 336 (A.B.R.1952), *aff'd*, 3 C.M.A. 73, 11 C.M.R. 73 (1953).

¹¹¹Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 46 Mil. L. Rev. 77 (1969).

¹¹²*Id.* at 92.

¹¹³*Id.*

courts were to "give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to *civilians*."¹¹⁴

On the other hand, civilian courts did not always apply civilian standards in military cases. During the time that federal courts were reviewing constitutional questions in collateral attacks on courts-martial, a few federal courts had interpreted the fourth amendment to protect service members, but only from searches that did not meet a *military standard* of reasonableness.¹¹⁵

The use of a separate military standard in civilian courts created some confusion in the military courts. Occasionally, the boards of review would forget that in the first tier of analysis they were to give the same interpretation to the rights of service personnel "as do civilian courts to those granted to *civilians*,"¹¹⁶ and would instead apply a standard of military reasonableness in the first instance. For example, in *United States v. Rhodes*¹¹⁷ the Army Board of Review asserted:

The Manual for Courts-Martial, United States, 1951, while citing certain instances of lawful searches seems to indicate that the ultimate test is whether a federal court would construe the search as reasonable We conclude that the search . . . was reasonable as having been effected in accordance with well recognized and long established customs of the service and in our opinion a federal court would so hold.¹¹⁸

Nevertheless, the Supreme Court reaffirmed the preference for civilian constitutional standards in military cases with its decision in *Burns v. Wilson*¹¹⁹ in 1953. There the Court again modified the scope of habeas corpus review of courts-martial and reemphasized the preeminence of constitutional standards in military cases. Although recognizing that the demands of military discipline often necessitated separate *standards*,¹²⁰ the Court announced that federal civil courts could review constitutional

¹¹⁴1 C.M.A. at 77, 1 C.M.R. at 77.

¹¹⁵*See, e.g.,* *Romero v. Squier*, 133 F.2d 528 (9th Cir.), *cert. denied*, 318 U.S. 785 (1943); *Richardson v. Zuppman*, 81 F. Supp. 809 (M.D. Pa.), *aff'd*, 174 F.2d 829 (3d Cir. 1949); *United States v. Best*, 76 F. Supp. 857 (D. Mass. 1948), *aff'd*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951); *Grewe v. France*, 75 F. Supp. 433 (D. Wis. 1948); *In re Meader*, 60 F. Supp. 80 (E.D.N.Y. 1945).

¹¹⁶*Clay*, 1 C.M.A. at 77, 1 C.M.R. at 77 (emphasis added).

¹¹⁷8 C.M.R. 336 (A.B.R. 1952), *aff'd*, 3 C.M.A. 73, 11 C.M.R. 73 (1953).

¹¹⁸*Id.* at 343.

¹¹⁹346 U.S. 137 (1953).

¹²⁰*Id.* at 140.

issues if they had not been fully and fairly considered by the military courts.¹²¹

This holding clearly indicated that military personnel were entitled to the protections provided by the Constitution, at least to some extent. Moreover, the Court implied that the extent of that protection should be similar to the protection afforded to civilians. The Court declared that "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his inherent **rights**."¹²²

Bums prompted the Court of Military Appeals' Chief Judge Quinn to agree almost immediately that military personnel were protected by the Bill of Rights.¹²³ Nevertheless, it took several years before his view became the court's established doctrine. Meanwhile, **Bums** did serve to focus the "military due process" analysis more firmly upon generally applicable constitutional standards.¹²⁴

The military "exceptions" to fourth amendment requirements were therefore generally limited to the specific provisions of the Manual for Courts-Martial. More importantly, by preferring generally applicable constitutional standards over those of the Manual the "military due process" approach required some sort of explanation every time the federal military power was allowed to invade personal rights further than the federal civil power could. This situation, coupled with the Supreme Court's statements in **Bums**, fostered litigation about whether a separate standard was needed at all. One of the first of such cases to reach the Court of Military Appeals challenged the lack of a "probable cause" requirement for military search authorizations.

¹²¹*Id.* at 144.

¹²²*Id.* at 142.

¹²³*See* United States v. Sutton, 3 C.M.A. 220, 228, 11 C.M.R. 220, 228 (1953) (dissenting opinion); *see also* United States v. Voorhees, 4 C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954); United States v. Barnaby, 5 C.M.A. 63, 65, 17 C.M.R. 63, 65 (1954) (dissenting opinion); United States v. Williamson, 4 C.M.A. 320, 331, 15 C.M.R. 320, 331 (1954) (dissenting opinion).

¹²⁴*See, e.g.,* United States v. Hillan, 26 C.M.R. 771, 786 (N.B.R. 1958) ("no accused is deprived of the protection of the constitution by reason of his military service"); United States v. Washington, 22 C.M.R. 346, 349 (A.B.R. 1956) ("duty of military courts . . . to safeguard essential or fundamental rights."); *accord* United States v. Ball, 8 C.M.A. 25, 23 C.M.R. 249 (1957); United States v. Wilcher, 4 C.M.A. 215, 15 C.M.R. 215 (1954); United States v. Swanson, 3 C.M.A. 671, 14 C.M.R. 89 (1954).

D. THE PROBABLE CAUSE REQUIREMENT

1. Conforming Military Law to the Civilian Model.

The Court of Military Appeals had emphasized in *Florence* that because paragraph 152 of the Manual made no mention of probable cause, a commander's discretion in authorizing a search could not ordinarily be questioned.¹²⁵

The Air Force Board of Review reasoned further in *United States v. Turks*¹²⁶ that "if either Congress or the President deemed it necessary or advisable to restrict . . . the commanding officer's exercise of discretion in ordering a search . . . such a restriction could easily have been incorporated in the law governing military jurisprudence."¹²⁷

When Mr. Robinson O. Everett examined military search and seizure precedents in 1956, he concluded "that the commanding officer can authorize such a search because he occupies a status very akin to that of a land owner, who can let people on **his** property for whatever reason he sees **fit**."¹²⁸ Nevertheless, he foresaw that "[i]t could be argued that the commander is simply a substitute for the magistrate, and, therefore, . . . evidence [of probable cause] is essential if the search is to be **legal**."¹²⁹

Mr. Everett thought, however, that the deciding factor would be the extraordinary responsibilities a military commander possessed over the area under his control. He predicted that if a commander deemed a search necessary to fulfill these responsibilities, it "would be held legal regardless of probable cause."¹³⁰

Nevertheless, in 1959 the Court of Military Appeals partially rejected the customary military pattern for resolving military search and seizure issues. In *United States v. Brown*,¹³¹ the court announced that a search was not reasonable merely because a commander determined it was necessary.

The accused was assigned to a military camp in Korea. His commander, Lieutenant Clark, had reason to believe that a group of soldiers, including the accused, was using narcotics. Lieutenant

¹²⁵*United States v. Florence*, 1 C.M.A. at 623, 5 C.M.R. at 51.

¹²⁶9 C.M.R. 641 (A.F.B.R. 1953).

¹²⁷*Id.* at 647.

¹²⁸R. Everett, *supra* note 74, at 102.

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹10 C.M.A. 482, 28 C.M.R. 48 (1959).

Clark knew that narcotics were readily available in the area where some members of this group had gone, and that one of them had borrowed money before leaving. When the accused and several other members of the group returned together, Lieutenant Clark ordered a search, and seized narcotics from the accused.¹³² The Court of Military Appeals held that the search was unreasonable for lack of probable cause:

While there is substantial discretion vested in the commanding officer to order a search ... Lieutenant Clark acted on nothing more than mere suspicion. Reasonable or probable cause was clearly lacking ... and, although the military permits certain deviations from civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same.¹³³

At first glance this does not appear to be a substantial deviation from the established military pattern. The court merely found that the commander lacked an adequate degree of suspicion to justify the search. This conclusion could have been reached under a military reasonableness test. The court, however, applied the civilian "probable cause" standard. Thus the court abandoned its former deference to the commander's judgment in order to conform military law to a civilian standard that had until then been preferred, but not required.

2. *Reactions.*

Judge Latimer filed a strong dissent. He thought the search should have been sustained under the military custom **clause**¹³⁴ of paragraph 152, of the Manual, and he stated that the commander's discretion to order a search should not be limited by a probable cause requirement:

[I]t must be remembered that a commanding officer has the duty to maintain law and order and to protect the welfare, health, well-being, and safety of the command. He cannot sit idly by and await positive information that offenses are being committed. He has an obligation to prevent any misbehavior which will impair the efficiency and good order of his command ... [I]n order to deter-

¹³²Report to the Secretary of the Army by the Committee on the Uniform Code of Military Justice Good Order and Discipline in the Army 89 (18 Jan. 1960) [hereinafter Powell Report].

¹³³10 C.M.A. at 487-88, 28 C.M.R. at 53-54 (footnote omitted).

¹³⁴*Id.* at 492, 28 C.M.R. at 58 (Latimer, J., dissenting).

mine whether a commander has reasonable cause to order a search, consideration must be given to his duties and responsibilities to maintain a combat ready outfit¹³⁵

In light of these dual responsibilities to maintain discipline and to maintain a combat ready unit, Judge Latimer proclaimed, "Not only do I believe he [Lieutenant Clark] acted within reason, but I am of the opinion he would have failed in his duties to his command if he had not taken some affirmative action to prevent the importation of habit forming drugs into his **area**."¹³⁶

According to Judge Latimer, the government interest in ensuring military discipline and control was so important that it justified, or even required, approving a search on a lesser degree of suspicion than "probable cause."

The following year these same government interests were reemphasized by the Committee on the Uniform Code of Military Justice Good Order and Discipline in the Army, usually called the Powell Committee after its chairman, General Herbert Powell. In its official report to the Secretary of the Army, the Committee recited the facts of *Brown*, strongly criticized its effect on military administration and discipline, and proposed a corrective amendment to the Uniform Code.¹³⁷

The proposed amendment, which was never passed by Congress, would have given commanders authority to order a search whenever they deemed it necessary "to safeguard the health and security" of their commands, or when they determined that a search would be "in the interest of good order and **discipline**."¹³⁸ The report explained that, "this broad power is supported by custom in the services and is a matter of military necessity. In this respect, a military community must have rules substantially different from the rules which are applicable in civilian **life**."¹³⁹

This military necessity grew out of two basic concerns—the commander's responsibility to maintain good order and discipline, and his responsibility for the health, safety, welfare, morale, and combat readiness of his unit. Judge Latimer and the Powell Committee perceived that if the commander's power to order searches were diminished, he would be hampered unacceptably to

¹³⁵*Id.* at 493, 28 C.M.R. at 59.

¹³⁶*Id.*

¹³⁷Powell Report, *supra* note 132, at 89-90.

¹³⁸*Id.*

¹³⁹*Id.*

fulfill these dual responsibilities. There were many before them who had expressed similar concerns.

V. PRESERVING EFFECTIVE COMMAND

When the first hearings were held to determine how to conform the Continental Articles of War to the Constitution, several authorities argued that the military's peculiar need for discipline justified giving less protection to the rights of military personnel. One authority, Colonel Tallmadge, "brought forward . . . instances of danger, when soldiers were not subject to severe laws. Soldiers, he observed, were a description of men, that must be ruled with severity."¹⁴⁰

A similar contention was raised in the first recorded military judicial decision on search and seizure. In *United States v. Ray*,¹⁴¹ decided in 1931, the board of review had partially overturned a conviction because of a fourth amendment violation.

The convening authority requested reconsideration, and argued that a service member "does not enjoy a constitutional guarantee against searches and seizures, when made in pursuance of the appropriate administration and discipline of the Army."¹⁴² Nevertheless, the board ruled that because its first decision had vacated the finding of guilty, reconsideration was not permissible.¹⁴³

The Judge Advocate General clearly agreed with the convening authority. In an official opinion he declared:

Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building in a place under military control, even though occupied as an office or as living quarters by a member of the military establishment, always has been regarded as *indispensable to the maintenance of good order and discipline* in any military command.¹⁴⁴

Furthermore, in *Burns* the Supreme Court had recognized that the need for discipline justified giving less protection to the rights of military personnel. There the Court had observed that "the rights of men in the armed forces must perforce be conditioned to

¹⁴⁰15 *Annals* of Cong. 327 (1806).

¹⁴¹3 B.R. 19 (1931).

¹⁴²*Id.* at 22.

¹⁴³*Id.* at 25.

¹⁴⁴JAG 250.413, 23 July 1930, as *digested in* Dig. Ops. JAG 1912-1940 § 395(27).

meet certain overriding demands of discipline and **duty**.”¹⁴⁵

Such statements demonstrate that more than ordinary law enforcement was involved. Certainly the commander’s duty to maintain good order and discipline included the responsibility to ensure that laws and regulations were obeyed. But it went much further.

As the Powell Committee report explained: “Discipline—a state of mind which leads to willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity.”¹⁴⁶ This need for a different kind of obedience was seen to justify different rules.

A military commander also had administrative responsibilities to manage the personnel and property under his control. Frequently the commander was personally accountable for substantial amounts of government property including arms, tools, equipment, and even real estate. Consequently he required extensive authority to administer such property, to see that both personnel and equipment were “fit to fight,” and to ensure the health and safety of his command.

Early military cases also saw the need for such extensive administrative authority as a reason to defer to command discretion in ordering searches and seizures.¹⁴⁷ For example, searches of private living areas on post had often been justified as searches of “public quarters.”¹⁴⁸ In 1952 the Court of Military Appeals had proclaimed:

The basis for this rule of discretion lies in the reason that, since such an officer has been vested with unusual responsibilities in regard to personnel, property, and material, it is necessary that he be given commensurate

¹⁴⁵*Burns v. Wilson*, 346 U.S. 137, 140 (1953).

¹⁴⁶Powell Report, *supra* note 132, at 11.

¹⁴⁷In *United States v. Worley*, 3 C.M.R. (AF) 424, 442 (1949), the Judicial Council said that “the Commanding Officer with respect to property under his control has plenary power. He is fully and directly responsible to his Government for all actions necessary to perform his duties.”

¹⁴⁸*See, e.g.*, *United States v. Bashein*, 5 B.R. 303 (1934) (stating that “the protection which the Constitution throws around the dwelling of a private individual or even of a military person off a reservation does not extend to public quarters on a military reservation”); *United States v. Lichtenberger*, 4 B.R. 81 (1933) (“public quarters on military reservations are subject to search”); Dig. Ops. JAG 1912-1940 § 395(27) (23 July 1930); *accord* *United States v. Kemerer*, 28 B.R. 393 (1943); *United States v. Berry*, 9 B.R. 155 (1938).

power to fulfill that responsibility . . . It is unnecessary, in this connection, to spell out the obvious policy considerations which require a differentiation between the power of a commanding officer over *military property* and the power of a police officer to invade a citizen's *privacy*.¹⁴⁹

These two fundamental elements—discipline and administrative authority—form the foundation of effective command. A commander must have adequate administrative authority to order the effective use of **all** his resources, and his personnel must be sufficiently disciplined to capably carry out those orders. A threat to either discipline or administrative authority is a threat to effective **command**.¹⁵⁰

These governmental interests were seen to justify a separate military balance of personal rights against government power. Nevertheless, it was several years before these considerations interrupted the trend toward applying civilian rules to the military.

VI. AFTER 1960: DIRECT CONSTITUTIONAL PROTECTION

Just one year after *Brown* imposed the probable cause requirement, the Court of Military Appeals decided *United States v. Jacoby*.¹⁵¹ In *Jucoby*, the court ruled that the sixth amendment required that the accused and defense counsel be allowed to confront and cross-examine witnesses at pretrial depositions. Accordingly, the court reversed a long-standing interpretation of Article **49** of the Uniform Code¹⁵² that permitted depositions on

¹⁴⁹"United States v. Doyle, 1 C.M.A. **545**, **548**, 4 C.M.R. **137**, **140** (1952)(emphasis added).

¹⁵⁰These same concerns arose as Congress considered the Military Justice Act of 1983. The Advisory Commission stated, "[M]ilitary punishment is different to the extent that it furthers discipline and enables the military to fulfill its mission of defence." 1 Military Justice Act of 1983 Advisory Commission Report **6** (1983).

¹⁵¹11 C.M.A. **428**, 29 C.M.R. **244** (1960).

¹⁵²UCMJ art. **49** provided:

(a) At any time after charges have been signed . . . any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial **of** those charges forbids it for good cause. . . .

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

written interrogatories without the presence of counsel or the accused.¹⁵³

Jacoby was the first case where a written provision of military law was revised to comply with the Bill of Rights instead of being sustained as an "exception." Moreover, a majority of the court held that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of the armed **forces**."¹⁵⁴

At first glance this would appear to be the culmination of the trend toward using civilian constitutional standards to protect the rights of military personnel. Nevertheless, the court did not abandon its previous approach completely. By excluding constitutional protections "which are . . . by necessary implication inapplicable," the court was still making allowance for military exceptions to the constitutional rules.

This approach—purporting to apply the Constitution while reserving the right to define military exceptions—created the potential for judicial conflict. As Judge Latimer noted in his dissenting opinion: "[B]y so doing we divest the Supreme Court of the United States of jurisdiction to be the final arbiter of . . . constitutionality."¹⁵⁵

Justices Black and Douglas had voiced similar concerns in *Burns v. Wilson*. In urging full federal court review in military habeas cases, they argued: "In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are *constitutional rules which we, not they, formulate*."¹⁵⁶

When *Jacoby* was decided, the Supreme Court could not review Court of Military Appeals decisions directly. Hence, the military courts could avoid an outright conflict only by applying as strictly as possible the constitutional rules developed by the

(d) A duly authenticated deposition taken under reasonable notice to the other parties, so far as otherwise admissible . . . may be read in evidence before any **military** court . . . in any case not capital.

¹⁵³See *United States v. Parrish*, 7 C.M.A. 337, 22 C.M.R. 127 (1956); *United States v. Sutton*, 3 C.M.A. 220, 11 C.M.R. 220 (1953).

¹⁵⁴11 C.M.A. at 430-31, 29 C.M.R. at 246-47.

¹⁵⁵*Id.* at 434, 29 C.M.R. at 250.

¹⁵⁶*Burns v. Wilson*, 346 U.S. at 154 (dissenting opinion) (emphasis added).

Supreme Court. Thus, in *United States v. Tempia*,¹⁵⁷ the Court of Military Appeals held that it was obligated to follow the Supreme Court's interpretations of the Constitution. Judge Kilday, in his concurring opinion, declared:

The decision of the Supreme Court on this constitutional question is imperatively binding upon us, a subordinate Federal court, and we have no power to revise, amend, or void any of the holdings of *Miranda*, even if we entertained views to the contrary or regarded the requirements thereof as onerous to the military authorities.¹⁵⁸

This approach also had its disadvantages. The Supreme Court, restricted to a limited collateral review of military convictions, had no direct opportunity to balance the inherent rights of service personnel against the administrative and disciplinary needs of the armed forces.

Consequently, although the Court of Military Appeals made a conscientious effort after *Tempia* to adhere to all Supreme Court interpretations of the fourth amendment,¹⁵⁹ numerous areas of

¹⁵⁷16 C.M.A. 629, 37 C.M.R. 249 (1967).

¹⁵⁸*Id.* at 641, 37 C.M.R. at 261.

¹⁵⁹See Manual for Courts-Martial. United States. 1969 (Rev. ed.), paragraph 152 [hereinafter MCM, 1969], which was revised to incorporate Supreme Court decisions after *Jacoby*:

a. Based on *Mapp v. Ohio*, 367 U.S. 643 (1961), the Manual's exclusionary rule was extended to those acting under State authority.

b. Standing provisions were added based on *Jones v. United States*, 362 U.S. 257 (1960).

c. A provision was added to allow the use of illegally seized evidence to rebut the accused's testimony based on the interpretation of *Walder v. United States*, 347 U.S. 62 (1954), in *United States v. Grosso*, 358 F.2d 154, 162 (3d Cir. 1966).

d. Searches incident to apprehension were extended to "the place where the apprehension was made" in reliance on *United States v. Rabinowitz*, 339 U.S. 56, 60 (1949). Nevertheless, following *Chimel v. California*, 395 U.S. 752 (1969), military courts limited such searches to the area within the accused's reach. *See, e.g., United States v. Pullen*, 41 C.M.R. 698 (A.C.M.R. 1970).

e. Approval for "hot pursuit" searches was added by language taken from *Warden v. Hayden*, 387 U.S. 294 (1967).

f. An explanation of permissible open field and woodland searches was added in light of federal cases limiting the doctrine to areas outside the curtilage. *See McDowell v. United States*, 383 F.2d 599, 603 (8th Cir. 1967); *Marullo v. United States*, 328 F.2d 361, 363 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964).

g. A provision was added recognizing third party consent to search as allowed in civilian cases. *See, e.g., Wright v. United States*, 389 F.2d 996 (8th Cir. 1968); *United States v. Airdo*, 380 F.2d 103 (7th Cir.), *cert. denied*, 389 U.S. 913 (1967); *see also Stoner v. California*, 376 U.S. 483 (1964).

h. Special conditions were placed on bodily intrusions based on *Schmerber v. California*, 384 U.S. 757 (1966).

i. Restrictions on intercepting communications were included, incorporating civil court interpretations of specified wiretap statutes. *See Katz v. United States*, 389

potential friction remained. In 1983 Congress provided a way to resolve such friction by amending the Uniform Code to allow the Supreme Court to review Court of Military Review decisions directly by writ of certiorari.¹⁶⁰ But in the meantime, two specific aspects of the commander's role in military search and seizure law generated considerable heat.

VII. THE DIFFICULTY OF FITTING MILITARY COMMANDERS INTO THE FOURTH AMENDMENT PATTERN

Over the years the Supreme Court had developed various fourth amendment patterns for determining the reasonableness of a search. It was difficult, however, to apply these patterns to the military because of the two types of examinations a commander could authorize—inspections and searches. It was difficult to distinguish between the two; to a casual observer and to the soldiers subject to them they looked the same.

Following *Jucoby* and *Tempiu* the power to make such an intrusion was subject to constitutional limitations. Nevertheless, the constitutional rules became dependent on whether the authorizing commander had ordered an “inspection” or a “search.”

U.S. 347 (1967); *see also* *Alderman v. United States*, 394 U.S. 165 (1969); *Morales v. New York*, 396 U.S. 102 (1965).

j. The reference to “customary” searches was modified to clarify that the constitutional requirement was that a search must be “reasonable” as stated in *Cooper v. California*, 386 U.S. 58 (1967).

k. A provision was added eliminating the “mere evidence” rule in reliance on *Warden v. Hayden*, 387 U.S. 294 (1967).

l. The requirement of probable cause was added, incorporating the reliability requirement of *Aguilar v. Texas*, 378 U.S. 108 (1964).

Additionally, investigatory stop and frisk rules developed from *Terry v. Ohio*, 392 U.S. 1 (1968), were incorporated into Army Regulation 190-22.

Subsequently, Executive Order 12198, 12 March 1980, replaced paragraph 152, and the other Manual evidence rules, with the Military Rules of Evidence. Rules 311-317 replaced paragraph 152 of the 1969 Manual. The new rules represented a “partial codification of the [then current] law relating to . . . search and seizure.” *See* Mil. R. Evid. analysis at A22-4.

The military rules of evidence were retained in the Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], and recent amendments have kept them up to date with Supreme Court announcements. The amendments adopt both the inevitable discovery doctrine of *Nix v. Williams*, 104 S. Ct. 2501 (1984), and the good faith exception of *United States v. Leon*, 104 S. Ct. 3405 (1984). *See* Exec. Order No. 12550, 51 Fed. Reg. 6497 (1986) (promulgating change no. 2 to MCM, 1984).

“Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405-06 (effective Aug. 1, 1984).

A. THE COMMANDER'S TWO HATS

In 1965 the Court of Military Appeals held that a commander stood "in the same relation *vis-a-vis* the investigating officer and an accused as the Federal magistrate."¹⁶¹

Quoting the Supreme Court's opinion in *Jones v. United States*,¹⁶² the court emphasized that the reason for requiring search warrants in civilian cases was " 'so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.' " ¹⁶³ The court then proclaimed that "in military law the 'independent judicial officer' is the commanding officer."¹⁶⁴

A commander therefore was expected to act as a neutral magistrate, while at the same time wearing another hat as the unit's chief inspector. The difficulty with this dual-hat approach is that inspections involve not only the same actions as searches, but they involve similar purposes as well. There may be a difference in what a commander intends to do about discoveries in the one case as compared to the other, but these intentions—his ultimate purpose—cannot alter the basic character of the tool employed. Both searches and inspections involve intruding upon the property and privacy interest of another person by looking through that person's papers and effects for the purpose of discovering any irregularities.¹⁶⁵

¹⁶¹United States v. Hartsook, 15 C.M.A. 291, 294, 35 C.M.R. 263, 266 (1965).

¹⁶²362 U.S.257 (1960).

¹⁶³15 C.M.A. at 294, 35 C.M.R. at 266 (quoting *Jones*, 362 U.S. at 270-71).

¹⁶⁴*Id.* at 295, 35 C.M.R. at 267.

¹⁶⁵It is ludicrous to pretend that military personnel have no privacy interest in their personal belongings simply because a commander has the power to intrude, or because others live in close proximity. It is like saying that a person's property—such as a stereo—is less valuable simply because a roommate has permission to use it, or because the commander looks at it. Likewise, a person's papers and effects have value to him or her. They may be intensely personal, and examining them may tend to reveal certain private facts.

Those private facts also have value—personal value—a value so recognized in the law that wrongful publication of private facts can justify awarding damages. It cannot be maintained that because a person's effects are continually subjected to government examination that they lose their personal value, or their property value.

Indeed, it is precisely because of the futility of private resistance to such government intrusion that the constitutional limitations on government power were made in the first place. Any government scrutiny of a person's private property is an invasion of the inherent rights to both privacy and property regardless of whether the examination is called a search or an inspection.

In several cases following *Jacoby*, references to "shakedowns" called them "searches" and "inspections" interchangeably. See, e.g., United States v. Daven-

It would seem more accurate to distinguish between a search and an inspection by looking at how the kind of suspicion that prompts a search differs from the kind of suspicion that prompts an inspection. Searches are prompted by an individualized type of suspicion focused upon certain individuals. Also, they usually involve some specific offense for which evidence is sought.

Inspections, on the other hand, are prompted by a knowledge of human nature. They involve only a generalized suspicion based on the knowledge that unless standards are checked often, they will not be vigorously maintained.

Every commander, having complete responsibility for the health, safety, and military readiness of a unit, attempts to meet these responsibilities by enforcing regulations, and by setting standards of his own. He then conducts inspections to ensure that these standards are maintained. The aftermath of such inspections often may differ little from that of a search. Wayward soldiers might be punished for dereliction of duty, disobedience of orders and regulations, or worse. As one commentator pointed out,

[I]nspections are unavoidably part of the criminal law and are designed to produce evidence of violations of the law. Behind all inspection intrusions is a legal norm for individual conduct and usually a sanction at criminal law for noncompliance. The inspection enforces the norm (1) by discovering actual violations and (2) by intruding into the privacy in which violations might occur and thus demonstrating to the individual that violations will not go undetected and unpunished ... [E]ven that Saturday morning military underwear inspector is looking for the man who has stacked his shorts contrary to regulation.¹⁶⁶

So the same commander who wielded extensive power to examine the "papers and effects" of his personnel in order to enforce military standards, was charged with protecting those personnel from unwarranted intrusions by *others* seeking a similar end. This situation naturally led to cases where the soldier alleged that the commander had not properly protected him from an unlawful search, while the commander contended that he had not

port, 14 C.M.A. 152, 156, 33 C.M.R. 364, 368 (1963); *United States v. Harman*, 12 C.M.A. 180, 187, 30 C.M.R. 180, 187 (1961) (Quinn, J., concurring); see also *United States v. Gebhart*, 10 C.M.A. 606, 28 C.M.R. 172 (1959); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 46 Mil. L. Rev. 77, 93 (1969).

¹⁶⁶Hunt, *Comment: Inspections*, 54 Mil. L. Rev. 225, 242-43 (1971).

incurred a duty to provide such protection because he was acting as an inspector rather than as a magistrate.

B. INSPECTIONS

The determinative test concerning inspections was established in 1965, in *United States v. Lange*.¹⁶⁷ There the Court of Military Appeals held that evidence seized during a purported inspection was inadmissible because the examination actually had been a search performed without probable cause. The court held that the line between a search and an inspection was defined by the "purpose" of the examination.

Quoting the board of review, the court announced that if an examiner's purpose was to discover "'contraband or other evidence to be used in the prosecution of a criminal action,'"¹⁶⁸ then he had conducted a search. But if instead he was trying to "'determine the fitness or readiness of the person, organization, or equipment, and, though criminal proceedings may result from matters uncovered thereby, it is not made with a view to any criminal action,'" then he had conducted an inspection for which no probable cause was required.¹⁶⁹

Although this distinction had its logical weaknesses, it was nevertheless consistent with the Supreme Court's earlier decision in *Frank v. Maryland*,¹⁷⁰ which had sanctioned using the purpose of an intrusion to determine its validity. There Justice Frankfurter had discussed warrantless public health inspections and had ruled that they did not violate the fourth amendment because, although they incidentally infringed a person's privacy, they were not intended to gather evidence for a criminal prosecution.

The logical weakness of *Lange* was exposed two years after it was decided, when the Supreme Court decided *Camara v. Municipal Court*.¹⁷¹ and repudiated the warrantless inspection rule. In *Camara* the Court recognized that searches and inspections served the same purpose, and held that a warrant was required to conduct a building inspection. In the companion case, *See v. City of Seattle*,¹⁷² the Court declared that "the decision to enter and

¹⁶⁷15 C.M.A. 486, 37 C.M.R. 458 (1965).

¹⁶⁸*Id.* at 489, 35 C.M.R. at 461 (quoting unreported Air Force Board of Review opinion below).

¹⁶⁹*Id.*

¹⁷⁰359 U.S. 360 (1959).

¹⁷¹387 U.S. 523 (1967).

¹⁷²387 U.S. 541 (1967).

inspect [could] not be the product of the unreviewed discretion of the *enforcement officer* in the *field*.”¹⁷³

More importantly, both *Camara* and *See* relied upon the fundamental constitutional principle of balancing governmental powers against the individual rights they infringe. First, the Court weighed the need for governmental power to conduct public health and safety inspections, and found it substantial. The court then proceeded to balance that interest against the rights of the people. The Court found that the importance of the governmental interests tipped the balance away from protecting individual rights and toward allowing government enforcement.

Therefore, the Court re-interpreted the probable cause requirement to hold that a lesser degree of suspicion “based on [an] appraisal of conditions in the area as a whole, not on . . . knowledge of conditions in each particular building”¹⁷⁴ would be sufficient to justify issuance of the required warrant. Nevertheless, this lower suspicion standard was only appropriate if “reasonable legislative or administrative standards for conducting an inspection”¹⁷⁵ were provided.

Later that same year the Supreme Court again rejected an attempt to use purpose to distinguish between allegedly different types of intrusions. In *Terry v. Ohio*,¹⁷⁶ the Court held that a “frisk” and a “search” were the same thing, and declared:

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.¹⁷⁷

Relying upon the balancing approach it had used in *Camara*,¹⁷⁸ the Court announced that the reasonableness of a search depended on two things—“whether the officer’s action was justified at its inception,” and “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”¹⁷⁹ In *Terry*, the Court ruled that the importance of

¹⁷³*Id.* at 545 (emphasis added).

¹⁷⁴*“Camara*, 387 U.S. at 536.

¹⁷⁵*Id.* at 538; *see also* *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

¹⁷⁶392 U.S. 1 (1967).

¹⁷⁷*Id.* at 18 n.15.

¹⁷⁸*Id.* at 21.

¹⁷⁹*Id.* at 20.

protecting police officers and the public not only justified an officer in conducting a frisk on less than probable cause, but also justified excusing him from the warrant requirement.

Subsequently, the Court also upheld statutory schemes providing for warrantless inspections of the highly regulated liquor and firearm businesses, because the government interests were so important that they justified dispensing with the warrant requirement as well as lessening the degree of suspicion required.¹⁸⁰ As highly regulated as the military is, such reasoning could provide considerable justification for warrantless military inspections. However, the Supreme Court made it clear that an inspection generally required a warrant; warrantless intrusion must be based on exceptional circumstances.¹⁸¹

1. Problems With the "Purpose" Distinction.

By generally requiring a warrant for inspections, the Court clearly signaled that individuals were to be shielded from the arbitrary decisions of inspectors. Nevertheless, although the Supreme Court had acknowledged that inspections, frisks, and searches were inherently the same, its decisions may have left some room for confusion when they discussed the importance of government purposes as the ground for diminishing constitutional requirements.

The military courts responded by emphasizing to an even greater degree that an inspection could be upheld only if it was conducted for a security, health, welfare, or other "valid purpose" and not to investigate crimes.¹⁸² This meant that any change from the original scope of an inspection which altered its "purpose" toward obtaining "criminal" evidence would transform it into a search requiring a command authorization based on probable cause.¹⁸³

Contraband drug inspections proved very vulnerable to this rule. Commanders not only inspected for drugs, but often

¹⁸⁰See *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Collonade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor).

¹⁸¹See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

¹⁸²See, e.g., *United States v. Wenzel*, 7 M.J. 95, 97 (C.M.A. 1979); *United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976); *United States v. Unrue*, 22 C.M.A. 466, 47 C.M.R. 556 (1973); *United States v. Poundstone*, 22 C.M.A. 277, 46 C.M.R. 277 (1973); *United States v. Maglito*, 20 C.M.A. 456, 43 C.M.R. 296 (1971); *United States v. Gebhart*, 10 C.M.A. 606, 28 C.M.R. 172 (1959).

¹⁸³See, e.g., *United States v. Roberts*, 2 M.J. 31 (1976); *United States v. King*, 2 M.J. 4 (1976); *United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976); *United States v. Chase*, 1 M.J. 275 (C.M.A. 1976); *United States v. Grace*, 19 C.M.A. 409, 42 C.M.R. 11 (1970).

authorized searches upon probable cause for them—something they did not do for dirty socks and underwear. The emphasis on investigating drug offenses put the commander in the position of acting one moment as a magistrate, protecting his personnel from overeager law enforcement officials, and acting the next as an inspector seeking to discover violations.

Under these circumstances it is no wonder that the military courts began to view inspections for drugs more as impermissible “searches for evidence” than as “administrative inspections.”¹⁸⁴ Rulings based on this view, however, diminished the commander’s authority in the very area where it was needed most. Although he had plenary authority to check for dirty socks, he was handicapped in preventing drug problems that were much more disruptive to good order and discipline. The “purpose” distinction seemed to do more harm than good.

2. *An Attempted Solution.*

In 1980 the drafters of the Military Rules of Evidence¹⁸⁵ attempted to restore the commander’s authority to maintain discipline while adhering to the Court of Military Appeals’ “purpose” rationale. Rule 313(b) specifically authorized inspections “to locate and confiscate unlawful weapons or other **contraband**.”¹⁸⁶ The drafters declared that the rule was “expressly intended to authorize inspections for unlawful **drugs**.”¹⁸⁷

The drafter’s motivation was important. They promulgated the rule because they believed that drugs represented “a potential threat to military efficiency of disastrous proportions,” and because they thought that drug use was “totally incompatible with the possibility of effectively fielding military forces capable of accomplishing their assigned **mission**.”¹⁸⁸ Here, again, the concern was for maintaining the discipline necessary for effective command.

Shortly after the Military Rules of Evidence became effective, the Court of Military Appeals considered the constitutionality of warrantless military contraband inspections. In *United States v.*

¹⁸⁴See *United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976); *United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976). *But* see *United States v. Harris*, 5 M.J. 44, 58 (C.M.A. 1978).

¹⁸⁵The Military Rules of Evidence became effective on 1 September 1980, by Change 3, MCM 1969. See Exec. Order No. 12,198, 3 C.F.R. 151 (1981).

¹⁸⁶Mil. R. Evid. 313(b).

¹⁸⁷Mil. R. Evid. 313 analysis at A22-21.

¹⁸⁸*Id.*

Middleton,¹⁸⁹ the court held that such inspections were reasonable under the fourth amendment. The need for military discipline in the armed forces proved to be the decisive factor:

To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.¹⁹⁰

Middleton was consistent with the Supreme Court's holdings that significant government interests could justify dispensing with the warrant requirement for inspections. Nevertheless, the Court of Military Appeals' holding and the Military Rules of Evidence left the anomalous "purpose" distinction intact, and thereby failed to address the underlying problem. At the same time, the conflict between the commander's roles as a magistrate and as an inspector made it almost as difficult for the court to apply constitutional standards in the magistrate area as it did in the inspection area.

C. THE NEUTRAL AND DETACHED COMMANDER

*United States v. Hartsook*¹⁹¹ had accepted the constitutional requirement that a search must be authorized by a neutral magistrate and had charged the commander with the responsibility of fulfilling that requirement. The Court of Military Appeals likewise quickly adopted other Supreme Court standards. For example, a commander was required to particularly describe the evidence that a search was intended to discover.¹⁹² He also had to ascertain the reliability of information submitted to him to establish probable cause.¹⁹³

¹⁸⁹10 M.J. 123 (C.M.A.1981).

¹⁹⁰*Id.* at 128 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)). The Court of Military Appeals also relied upon *Parker v. Levy*, 417 U.S. 733, 744 (1974), where the Supreme Court had quoted its earlier statement in *Burns v. Wilson*, 346 U.S. 137, 140 (1953), that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."

¹⁹¹15 C.M.A. 291, 35 C.M.R. 263 (1965).

¹⁹²*See, e.g.*, *United States v. Hendrix*, 21 C.M.A. 412, 45 C.M.R. 186 (1972); *United States v. Fleener*, 21 C.M.A. 174, 44 C.M.R. 228 (1972); *United States v. Schultz*, 19 C.M.A. 311, 314, 41 C.M.R. 311, 314 (1970); *see generally* McNeill, *Recent Trends in Search and Seizure*, 54 Mil. L. Rev. 83, 88-89 (1971).

¹⁹³*See, e.g.*, *United States v. Lidle*, 21 C.M.A. 455, 45 C.M.R. 229 (1972); *accord* *United States v. Armstrong*, 42 C.M.R. 756 (A.C.M.R.1970).

In general, military courts began to apply all of the requirements for a valid warrant that the Supreme Court had derived from the fourth **amendment**,¹⁹⁴ except for the few "exceptions" that originally had been based on the Manual for Courts-Martial.¹⁹⁵ These exceptions were generally sustained on the principle of stare decisis, although the Court of Military Appeals did encourage, without requiring, the submission of written affidavits, rather than oral statements, to the official authorizing a **search**.¹⁹⁶

Logically, if the rights of service personnel were now protected by the Constitution instead of by military law itself, then the constitutional requirements should have superceded these military "exceptions". Nevertheless, the first direct constitutional attack against the military search authorization scheme did not confine itself to one of these exceptions.

In 1979 the accused in *United States v. Ezell*¹⁹⁷ went to the very heart of the matter and challenged the *Hartsook* premise that a commander could fulfill the constitutional role of a neutral and disinterested magistrate. The defense relied on *United States v. United States District Court*,¹⁹⁸ where the Supreme Court had said:

The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. . . . [T]hose charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitu-

¹⁹⁴See *United States v. Ezell*, 6 M.J. 307, 315 (C.M.A. 1979); *United States v. Grosskreutz*, 5 M.J. 344 (C.M.A. 1978); *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978); *United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976); *United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976); *United States v. Guerette*, 23 C.M.A. 281, 49 C.M.R. 530 (1975); *United States v. Staggs*, 23 C.M.A. 111, 48 C.M.R. 672 (1974); *United States v. Glenn*, 22 C.M.A. 295, 46 C.M.R. 295 (1973); *United States v. Simmons*, 22 C.M.A. 288, 46 C.M.R. 288 (1973); *United States v. Sam*, 22 C.M.A. 124, 46 C.M.R. 124 (1973). See generally *J. Munster & L. Larkin*, *Military Evidence* § 9.1 (2ded. 1978).

¹⁹⁵See, e.g., *United States v. Florence*, 1 C.M.A. 620, 5 C.M.R. 48 (1952); *United States v. Doyle*, 1 C.M.A. 545, 4 C.M.R. 137 (1952).

¹⁹⁶See, e.g., *United States v. Penman*, 16 C.M.A. 67, 69, 36 C.M.R. 223, 225 (1966); *United States v. Martinez*, 16 C.M.A. 40, 42, 36 C.M.R. 196, 198 (1966); *United States v. Hartsook*, 15 C.M.A. 291, 294, 35 C.M.R. 263, 266 (1965); *United States v. Davenport*, 14 C.M.A. 152, 33 C.M.R. 364 (1963); cf. *United States v. Stuckey*, 10 M.J. 347, 363 (C.M.A. 1981).

¹⁹⁷6 M.J. 307 (C.M.A. 1979).

¹⁹⁸407 U.S. 297 (1972).

tionally sensitive means in pursuing their tasks.¹⁹⁹

The Court of Military Appeals, however, rejected the argument that the commander's conflicting roles created a *per se* disqualification, and merely held that the commander must assume the attributes of a neutral magistrate when authorizing a search.²⁰⁰ The court avoided having to retreat from its policy of strict adherence to Supreme Court standards by adopting the legal fiction that commanders could act enough like disinterested magistrates to satisfy fourth amendment requirements.

D. APPLYING THE FOURTH AMENDMENT LITERALLY: THE LAST STRAW

A year later such efforts to adhere strictly to constitutional requirements did result in overturning one of the military exceptions—the exception to the oath requirement. In *United States v. Fimmano*,²⁰¹ Judges Perry and Fletcher ruled, over Judge Cook's dissent, that commanders must base a search authorization only on sworn information.

Quoting from *Ezell* that “ ‘the Fourth Amendment applies with equal force within the military as it does in the civilian community’ ”²⁰² the court simply applied the fourth amendment's express requirement that probable cause be “supported by Oath or affirmation.”

In response to Judge Cook's criticism that the court's decision wiped out two centuries of military practice, Judge Fletcher remarked upon the need to avoid friction between the Supreme Court and the Court of Military Appeals. He declared:

[A]ll the majority does is follow the traditional analysis of applicability of constitutional rights and to reach a conclusion different from that previously espoused. What the dissenting judge does is far more serious, for his approach would constitute a fundamental *change* in the settled analytical technique of this Court and of *the United States Supreme Court*.²⁰³

By strictly applying the same interpretation of the fourth amendment that the Supreme Court applied in civilian cases,

¹⁹⁹*Id.* at 317.

²⁰⁰6 M.J. at 314-15.

²⁰¹8 M.J. 197 (C.M.A. 1980).

²⁰²*Id.* at 199 (quoting *Ezell*, 6 M.J. at 315).

²⁰³*Id.* at 206 (Fletcher, C.J., concurring) (emphasis added).

Fimmano represented the consummation of the course begun in *Jacoby*. Nevertheless, this strict application of the Constitution to military searches was extremely short-lived.

E. A RETURN TO SEPARATE STANDARDS

The Court of Military Appeals overruled *Fimmano* in 1981, only a year after it had been decided. In the meantime Mr. Robinson O. Everett had become the court's Chief Judge. In *United States v. Stuckey*,²⁰⁴ Chief Judge Everett and Judge Cook combined to hold that the Constitution did not require a commander's search authorization to be based on sworn information after **all**. Judge Fletcher concurred in the result because the search had occurred prior to the decision in *Fimmano*.

The court went much further, however, than merely overturning *Fimmano*. Although both Judge Fletcher and Judge Cook reaffirmed the holding in *Ezell*, Chief Judge Everett implicitly rejected the *Ezell* analysis. The Chief Judge first disavowed that commanders were ever strictly equated with magistrates,²⁰⁵ and then went on to explain that "a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate' in the strict **sense**."²⁰⁶ This was true primarily because "[a] military commander has responsibilities for investigation and for law enforcement that a magistrate does not **possess**."²⁰⁷

Therefore, Chief Judge Everett departed from the Supreme Court's interpretation of the fourth amendment by declaring that in situations where civil authorities would need to obtain a warrant from a neutral magistrate, military authorities could obtain a search authorization from a commander having "responsibilities for investigation and for law **enforcement**."²⁰⁸ In his view, the commander's power was beyond the scope of the warrant requirement, so that the commander did not have to qualify as a neutral magistrate. Nevertheless, Chief Judge Everett accepted that military searches had to be "reasonable" under the

²⁰⁴10 M.J. 347 (C.M.A.1981).

²⁰⁵*Id.* at 360 ("[A] commander's authorization of a search has never been equated with the judicial-type procedure which comes within the contemplation of the warrant clause of the Fourth Amendment.").

²⁰⁶*Id.* at 361.

²⁰⁷*Id.* at 359; see *id.* at 361 n.18.

²⁰⁸*Id.*

fourth amendment; he concluded that granting such power to commanders was reasonable.²⁰⁹

These conclusions were based on a thorough review of the early precedents upholding command authorized searches. From these Chief Judge Everett distilled the premise "that a commander basically could order such searches as he saw fit by reason of his general control over the area to be **searched**."²¹⁰ This was a restatement of his 1956 argument that "the commanding officer can authorize such a search because he occupies a status very akin to that of a land owner, who can let people on his property for whatever reason he sees **fit**."²¹¹

In 1983 Judge Cook adopted Chief Judge Everett's conclusions. Writing for the court in *United States v. Foust*,²¹² Judge Cook held that a commander could base a search authorization on unsworn information even though a regulation implementing *Fimmano* was then in effect that required an oath.²¹³ He grounded the decision firmly on *Stuckey*, declaring that "*we* held that the Fourth Amendment's requirement that warrants could only be issued upon probable cause was not relevant in a military situation, since the commander was not a magistrate and he did not 'issue warrants.'"²¹⁴

This was an extremely broad statement. To say that the "requirement that warrants could only be issued upon *probable cause was not relevant* in a military situation" implied that neither warrants *nor probable cause* were constitutionally required in the military. Such an interpretation, if intended, would depart radically from the Supreme Court's interpretations of the amendment.

If the Court of Military Appeals could disregard the neutral and detached magistrate requirement—which the Supreme Court had

²⁰⁹*Id.* at 361-62. This reasoning seems to beg the question. The power to search is always a reasonable government power. The only concern is that it be **exercised** reasonably. It is reasonable to give all search authority to law enforcement officers, so long as they **exercise** it only after the degree of their suspicion has been assessed by a neutral magistrate. The question is not whether the commander has responsibilities that necessitate occasional searches, it is whether he should be allowed to assess the sufficiency of **his own** suspicion.

²¹⁰*Id.* at 356.

²¹¹R. Everett, *supra* note 73, at 102.

²¹²17 M.J. 85 (C.M.A. 1983).

²¹³Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, para. 14-3 (C20, 15 August 1980) [hereinafter AR 27-10]. After *Stuckey*, the regulation was changed to eliminate the oath requirement. AR 27-10, para. 9-8 (1 September 1982).

²¹⁴17 M.J. at 86-87.

held to be “[t]he point”²¹⁵ of the warrant clause—why could it not likewise disregard the probable cause **requirement**?²¹⁶ After all, the oath requirement had already met a similar fate. Moreover, the Court of Military Appeals, in ruling that the warrant clause was irrelevant to the military, also undertook to interpret the amendment’s basic reasonableness requirement—a job normally left to the Supreme Court.

Stuckey and Foust retreated from the strict policy of avoiding potential friction with the Supreme Court. Although Stuckey relied upon earlier cases in sustaining commander authorized searches, its rationale was significantly different. Virtually all of those cases were decided before the Court of Military Appeals had held that the fourth amendment protected service personnel. At that time it was considered constitutionally permissible for the military to have a separate standard. Therefore those decisions involved interpretations of military law alone.

On the other hand, in Stuckey the court clearly declared the **full** applicability of the fourth amendment. Chief Judge Everett, however, then went on to reinterpret the amendment to allow commanders to authorize searches on unsworn information and without qualifying as neutral magistrates. The Supreme Court had never rendered such an interpretation. Apparently, Chief Judge Everett regarded the potential for conflict with the Supreme Court as less threatening than the problems stemming from a continued effort to force the military commander into a constitutional pattern that just did not fit.²¹⁷

Anxiety over a separate military interpretation **of** the fourth amendment may explain the seemingly ambiguous decision in *United States v. Kalscheuer*.²¹⁸ There the Court of Military Appeals struck down the established military rule that allowed commanders to delegate their power to authorize searches, even though searches authorized by **delegees** had always been measured by the same standards of reasonableness imposed upon commanders. This ruling, in effect, placed the commander in a

²¹⁵*Johnson v. United States*, 333 U.S. 10, 13 (1948).

²¹⁶When Chief Judge Everett first espoused the “land owner” theory in 1956, he thought it justified a commander in authorizing searches on less than probable cause. See R. Everett, *supra* note 73, at 102.

²¹⁷The enactment of section ten of the Military Justice Act of 1983 provided the means to resolve any potential friction by giving the Supreme Court power to directly review Court of Military Appeals decisions on writ of certiorari. See UCMJ art. 67(h); 28 U.S.C. § 1259 (Supp. III 1985).

*¹¹ M.J. 373 (C.M.A. 1981).

role more akin to that of a magistrate, thereby 'civilianizing' military practice to some extent.

In doing so, however, the court confirmed the rationale of *Stuckey*. The court reasoned that "[b]y virtue of his command status, a commander has responsibilities that others do not possess."²¹⁹ The court said that it was only because of those responsibilities that a commander's power to authorize searches was reasonable under the fourth amendment. Therefore, a commander could not delegate search authorizing power to those who did not share the same responsibilities.

By hinging its decision on the responsibility of the commander, the court substantially adopted Chief Judge Everett's "land owner" theory. The "land owner" rationale, however, was grounded upon the importance of the government interest in giving commanders adequate administrative authority. It is doubtful that this interest alone should have justified dispensing with the warrant requirement. If it was really necessary to create a constitutional exception not previously recognized by the Supreme Court, the much stronger rationale would have been the need to preserve discipline.

VIII. THE DISCIPLINE EXCEPTION

At the time of Chief Judge Everett's appointment to the Court of Military Appeals, he was interviewed by the *Army Times*. The ensuing article stated: "Unhappy military commanders have claimed that COMA has been 'civilianizing' military law to the detriment of discipline."²²⁰ Although the article did not specifically attribute this statement to Chief Judge Everett, it is fair to assume that the interviewer asked him about it, and that he was aware of this concern.

As previously noted, the need for military discipline has shaped the development of military search and seizure law since colonial days. But even more importantly, it has always been the primary justification given by federal civilian courts for allowing military authority to exceed the bounds set by the Constitution for civil authority.²²¹ Indeed, some cases have held that the military **can**

²¹⁹*Id.* at 376.

²²⁰"Smith, *Military Justice—Double First Class*, *Army Times*, July 14, 1980, at 12, col. 1.

²²¹*See* *Rostker v. Goldberg*, 453 U.S. 57, 69 n.6 (1981) (quoting S. Rep. 826, 96th Cong., 2d Sess. 159-60, reprinted in 1980 U.S. Code Cong. & Ad. News 2649); *Brown v. Glines*, 444 U.S. 348 (1980); *Burns v. Wilson*, 346 U.S. 137 (1953); *Watkins v. United States Army*, 721 F.2d 687 (9th Cir. 1983); *Hatheway v.*

exceed constitutional restrictions *only* where the need for military discipline is involved.²²²

Some organizations, labeling themselves as quasi-military, have attempted to minimize constitutional requirements by claiming that, like the military, their needs for discipline justify lesser constitutional protections for their members.²²³ These attempts generally have been **rejected**,²²⁴ with the clear implication that, although a need for *military* discipline will justify overriding constitutional protections, the lesser disciplinary requirements of other organizations will not.

Nevertheless, in 1985 the Supreme Court created an exception to the warrant requirement based on the need for discipline in the public schools. At least two lower federal courts had previously suggested an analogy between military discipline and **school** discipline. They implied in dicta that, just as the need for military discipline justified lesser protection for individual rights in the military, the discipline needed in schools might justify lesser protection for constitutional rights in a school setting.²²⁵

Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975); *Cortright v. Resor*, 447 F.2d 245, 252-53 (2d Cir. 1971), *cert denied*, 405 U.S. 965 (1972); *Anderson v. Laird*, 437 F.2d 912 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir.), *cert. denied*, 396 U.S. 976 (1969); *Petrey v. Flaughner*, 505 F. Supp. 1087, 1091 n.21 (E.D. Ky. 1981); *Huff v. Secretary of the Navy*, 413 F. Supp. 863 (D.D.C. 1976), *aff'd in part, vacated in part on other grounds*, 575 F.2d 907 (D.C. Cir. 1978), *rev'd on other grounds*, 444 U.S. 453 (1980); *Culver v. Secretary of the Air Force*, 389 F. Supp. 331 (D.D.C. 1975), *aff'd*, 559 F.2d 622 (D.C. Cir. 1977); *Martin v. Schlesinger*, 371 F. Supp. 637 (W.D. Ala. 1974); *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974); *Talley v. McLucas*, 366 F. Supp. 1241 (N.D. Tex. 1973); *McWhirter v. Froehlke*, 351 F. Supp. 1098, 1101 (D.S.C. 1972).

²²²*See* *Anderson v. Laird*, 466 F.2d 283, 294 n.70 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972); *United States ex rel. Flemings v. Chafee*, 458 F.2d 544 (2d Cir. 1972), *rev'd on other grounds*, 413 U.S. 665 (1973); *Stanley v. United States*, 574 F. Supp. 474 (S.D. Fla. 1983); *Dash v. Commanding General*, 307 F. Supp. 849 (D.S.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971); *United States v. Miller*, 261 F. Supp. 442 (D. Del. 1966).

²²³*See, e.g.*, *Egger v. Phillips*, 710 F.2d 292 (7th Cir.) (Coffey, J., concurring in part), *cert. denied*, 464 U.S. 918 (1983) (FBI); *Hanneman v. Breier*, 628 F.2d 760 (7th Cir. 1976) (police department); *Yarbrough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973), *aff'd*, 604 F.2d 769 (6th Cir. 1974) (fire department); *Black v. Rizzo*, 360 F. Supp. 648 (E.D. Pa. 1973) (fire department); *Flynn v. Giarrusso*, 321 F. Supp. 1295 (E.D. La. 1971) (police department).

²²⁴*But see* *Kelly v. Johnson*, 425 U.S. 238 (1975) (police department haircut regulations upheld).

²²⁵*See* *Mitchell v. Visser*, 529 F. Supp. 1034, 1046 (D. Kan. 1981); *Petrey v. Flaughner*, 505 F. Supp. 1087, 1091 n.21 (E.D. Ky. 1981).

This analogy presumes a discipline-based reduction in constitutional protections in the military. The Supreme Court did not expressly mention the military, and therefore did not expressly affirm this presumption. Its reasoning, nevertheless, has great meaning for the military.

A. THE CREATION OF THE DISCIPLINE EXCEPTION

In *New Jersey v. T.L.O.*,²²⁶ a teacher caught a student smoking in the lavatory contrary to school rules, and took her to the Assistant Vice Principal. In response to his questions, the student denied smoking in the lavatory and said that she did not smoke at all. He demanded her purse, and upon opening it found a pack of cigarettes and also noticed a pack of cigarette rolling papers commonly used to roll "joints." Upon searching more thoroughly, he found some marihuana, a pipe, plastic bags, a substantial amount of money, and two letters that implicated her in marihuana dealing. The issue on appeal was whether the juvenile court erred by admitting this evidence at the student's trial.

The Supreme Court held that the evidence was admissible because, although the reasonableness requirement of the fourth amendment applied to searches conducted by public school officials, the warrant and probable cause requirements did not. The decision to excuse school officials from these requirements was based on the balancing approach that the Court had used in *Camara*.²²⁷

First the Court determined that school children have a legitimate expectation of privacy in their personal items despite "the pervasive supervision to which children in the schools are necessarily subject."²²⁸ Against this individual interest the Court weighed "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."²²⁹

With respect to the school's interest, the Court explained, "[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren . . . 'Events calling

²²⁶*New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985).

²²⁷*Id.* at 741 (quoting *Camara*, 387 U.S. at 536-37: "The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'").

²²⁸*Id.* at 742.

²²⁹*Id.*

for discipline are frequent occurrences and sometimes require immediate, effective action.’’²³⁰

Moreover, the Court acknowledged that effective discipline requires maintaining appropriate disciplinary relationships: “[W]e have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures and we have respected the value of preserving the informality of the student-teacher **relationship**.”²³¹

In a concurring opinion, Justices Powell and O’Connor detailed the characteristics of such relationships that “make it unnecessary to afford students the same constitutional protections granted . . . in a nonschool setting.”²³² After pointing out that law enforcement officers function as adversaries of criminal suspects, they observed: “Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student’s welfare as well as for his **education**.”²³³ The opinion also explained that “[o]f necessity, teachers have a degree of familiarity with and authority over, their students that is unparalleled except perhaps in the relationship between parent and **child**.”²³⁴

Upon balancing **all** of these considerations the Court concluded that

the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintainance of the swift and informal disciplinary procedures needed in the schools.²³⁵

²³⁰*Id.* at 742-43 (quoting *Goss v. Lopez*, 419 U.S. 565, 580 (1975)).

²³¹105 S. Ct. at 743.

²³²*Id.* at 747 (Powell and O’Connor, J.J., concurring).

²³³*Id.* at 748.

²³⁴*Id.* at 747.

²³⁵*Id.* at 743 (White, J., with Burger, C.J., and Rhenquist joining in the Court’s opinion).

Justice Blackmun concurred in the judgment but stressed that the basic rule was that a search without a valid warrant is unreasonable. The need for schools to establish discipline and maintain order justified departing from that rule in this case. *Id.* at 750.

B. THE BREADTH OF THE EXCEPTION

The Court went on to explain the appropriate balancing pattern to apply under this new discipline exception to the warrant requirement. In doing so, it created a rule that went further than present military practice in three important respects.

1. Reasonable Belief.

First, and most importantly, the Court ruled that a level of suspicion lower than probable cause was sufficient to render the school official's search reasonable.²³⁶ The Court held that the school's need for discipline justified the lower standard: "[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause. . . ." ²³⁷

Using the two pronged test for determining reasonableness that it had articulated in *Terry v. Ohio*, the Court announced a new standard for a school search: At its inception, the search must be based on "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."²³⁸ Thereafter, the actual scope must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."²³⁹

The Court reserved the question of how individualized the initial suspicion must be, but pointed out that "exceptions to the requirement of individualized suspicion are generally appropriate

Justice Brennan, joined by Justice Marshall, said that the special needs of the schools justified substituting a balancing test for the warrant requirement, but found the balance to weigh in favor of the schools because of the need to protect the safety of students and teachers. *Id.* at 752.

Justice Stevens, also joined by Justice Marshall, agreed that the warrant requirement could be dispensed with because of the need of school officials to maintain order, but only for searches "undertaken for those purposes," rather than for enforcement of such things as minor dress codes. *Id.* at 762.

²³⁶*Id.* at 743. Although the Court unanimously excused teachers from the warrant requirement, one or two disagreed with relaxing the probable cause standard. Justice Brennan, joined by Justice Marshall, said that the probable cause standard should be retained. *Id.* at 762. However, Justice Marshall also joined in Justice Stevens' opinion, which said that a standard lower than probable cause should be used, but that it should be linked to the seriousness of the suspected offense. *Id.* at 763.

²³⁷*Id.* at 743.

²³⁸*Id.* at 744.

²³⁹*Id.*

only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." ',"²⁴⁰

2. Dissolving the "Purpose" Fiction.

The Court derived the principle that "other safeguards" must be provided in the absence of individualized suspicion from its previous administrative inspection cases. Indeed, the second way that *T.L.O.* went further than present military practice was that it implicitly recognized the essential similarity between searches and inspections.

In *T.L.O.* the Court relied upon its inspection cases to show how the fourth amendment applied to school officials.²⁴¹ The inspection cases also provided the balancing test the Court used to arrive at its decision.²⁴² *T.L.O.* applied the rationale from the Court's seminal inspection case, *Cumuru*, in announcing its holding:

Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," [*Cumuru*], we hold today that school officials need not obtain a warrant before searching a student who is under their authority.²⁴³

In both *T.L.O.* and *Camara* the Court simply applied the fundamental principle of balancing government interests against individual rights. In *Camara* the Court had stated that to apply the constitutional standard of reasonableness it was "necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."²⁴⁴ After making this assessment, *Camara* had affirmed that there was "no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."²⁴⁵

²⁴⁰*Id.* at 744 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979), which was in turn quoting *Camara v. Municipal Court*, 387 U.S. at 632).

²⁴¹*Id.* at 740 (quoting *Camara*, 387 U.S. at 528, 630, and *Marshall v. Barlow's, Inc.*, 436 U.S. at 312-13).

²⁴²*Id.* at 741 (quoting *Camara*, 387 U.S. at 636-37).

²⁴³*Id.* at 743 (citation partially omitted).

²⁴⁴*Camara*, 387 U.S. at 534-35.

²⁴⁵*Id.* at 536-37.

The Court had also quoted this language in *Terry v. Ohio*,²⁴⁶ and had applied the same balancing approach to “frisks,” explaining that the fourth amendment applied to all intrusions, whatever they were called. Relying upon the *Camara* balancing approach,²⁴⁷ the Court announced in *Terry* that the reasonableness of a search depended on two things—“whether the officer’s action was justified at its inception,” and “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”²⁴⁸ In *T.L.O.* the Court merely articulated how this two-pronged test should be applied to school searches.

The *T.L.O.* decision even addressed the type of problem that military courts had encountered in trying to distinguish between inspections to enforce regulations and inspections to enforce drug laws. The Court made it clear that the legality of a search was not to hinge “upon a judge’s evaluation of the relative importance of various school rules.”²⁴⁹ Rather, courts were to accept the judgment of school officials that established rules were necessary to maintain discipline and order.

This blending of rationales implies that because searches and inspections are essentially the same, they may be subjected to substantially the same test for reasonableness. They should both be justified at their inception, and be reasonably related in scope to the objectives sought.

There *is* a difference in what constitutes initial justification for the two types of intrusions, however. *T.L.O.* established a reasonable suspicion standard for searches under the discipline exception. On the other hand, inspections often do not involve any real “suspicion” at all.

For example, the military must be prepared to successfully defend the nation on a moment’s notice. Such preparedness cannot be determined or maintained without periodic command inspections to ensure that all is “up to snuff.” It is not individualized suspicion that justifies these intrusions; rather, it the importance of the government interest coupled with the general knowledge that unless standards are frequently checked and effectively enforced they will not be maintained.

²⁴⁶392 U.S. 1 (1967).

²⁴⁷*Id.* at 21.

²⁴⁸*Id.* at 20.

²⁴⁹105 S. Ct. at 744 n.9.

This general knowledge constitutes the only “suspicion” in most inspection situations. Nevertheless, the Supreme Court has held that when the government interest is great enough, the warrant requirement may be dispensed with, and an inspection conducted, provided that the authorization for the inspection provides sufficient “other protections.”

In *Donovan v. Dewey*,²⁵⁰ its latest inspection case, the Court upheld a warrantless inspection scheme under the Federal Mine Safety and Health Act of 1977²⁵¹ because the warrant requirement would have interfered with the important government objective of mine safety, and because the statutory inspection scheme satisfied the fourth amendment’s requirement of reasonableness.

The Court held that the inspection plan satisfied the reasonableness requirement because (1) it clearly informed **all** mine owners that they were subject to a certain minimum number of periodic inspections; (2) it fully informed them about the purposes of the inspection and set forth the standards that would be checked; and (3) it prevented excessive intrusions and otherwise limited the scope of the inspection to **checking** on the specified **standards**.²⁵²

These factors easily fit the two-pronged analysis for reasonableness set forth in *Terry* and *T.L.O.*. An inspection that is not subject to the warrant requirement is “reasonable at its inception,” if it is instigated as part of an established inspection plan that informs those subject to the inspection of the standards they are to meet and of the general time, place, manner, and frequency of inspections. Its scope is then proper if the degree of intrusion is reasonably related to the enforcement of the established standards and not excessively intrusive in light of **all** the circumstances.

Nearly every military unit has an established inspection plan that would meet such requirements. Such plans usually allow noncommissioned or petty officers to initiate appropriate inspections on their own authority.

3. *Shared Search Authority.*

The third way in which *T.L.O.* goes further than present military practice is with respect to the “delegation” of search authority. As already noted, the Court of Military Appeals ruled

²⁵⁰452 U.S. 594 (1981).

²⁵¹30 U.S.C. §§ 801-962 (1982).

²⁵²452 US. at 603-05.

in *Kalscheuer* that the theory of *Stuckey* precluded a commander from delegating his search authority to others who did not have the unique command responsibilities that rendered the power reasonable under the fourth amendment.

In *T.L.O.* the Supreme Court extended the discipline exception to **all** teachers, not just principals. The Court based its decision on the disciplinary needs of teachers in the classroom and not merely on the responsibilities of administrators in the office. The clear implication was that those with disciplinary responsibility, even those low in the "chain of **command**,"²⁵³ were to be exempt from the warrant and probable cause requirements.

The Court intimated one limitation on this rule by reserving the question of whether the same standards would apply to searches where "law enforcement agencies" were involved.²⁵⁴ The Court cited *Picha v. Wielgos*,²⁵⁵ a federal district court case holding that the probable cause standard applied to school searches involving police. Although the Court obviously did not intend to extend the discipline exception to law enforcement agencies, it definitely intended the exception to apply to **all** school officials charged with maintaining appropriate discipline in the schools.²⁵⁶

IX. THE DISCIPLINE EXCEPTION AND THE MILITARY

The three broad aspects of *T.L.O.*—the reasonable suspicion standard, the blending of inspection and warrantless search rationales, and the recognition of first line disciplinary authority—offer the opportunity to resolve several practical problems encountered in the military. Moreover, the "discipline" rationale justifies reliance upon *T.L.O.* within the military, which requires the ultimate in discipline.

As one federal court remarked, "An Army without discipline is a **mob**."²⁵⁷ A greater degree of discipline is needed to control **and**

²⁵³*Mil. R. Evid.* 315(d)(1) presently gives only commanders, or those the Secretary has designated to be the equivalent of commanders, the power to authorize searches.

²⁵⁴105 S. Ct. at 744 n.7.

²⁵⁵410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976).

²⁵⁶If the commander is considered to be primarily a law enforcement agent, then the discipline exception would arguably be unavailable to him. However, the primary role of the commander is leadership, not law enforcement. His duty to care for his subordinates is second only to his duty to accomplish his mission. And his emphasis on discipline is to aid in mission accomplishment; it is discipline **in** action to fostering discipleship, not mere enforcement for the sake of obedience.

²⁵⁷*McWhirter v. Froehlike*, 351 F. Supp. 1098, 1101 (D.S.C. 1972).

direct the violence for which the military is organized than is needed to prevent disruption in a school. Likewise, **drug** use, such as that involved in *T.L.O.*, could have a far more devastating effect on the ability of a military unit to fulfill its function than on the ability of a school to fulfill its. If the need for discipline in the schools justifies dispensing with the warrant and probable cause requirements for a search, then, *a fortiori*, the requirements of military discipline do, also,

Furthermore, the special relationships relied upon in *T.L.O.* are present to an even greater extent in the military than in the schools. Whereas a typical teacher's attitude may be "one of personal responsibility for the student's welfare as well as **his education**,"²⁵⁸ a military leader regards caring for the well-being of his subordinates as absolutely essential to his unit's effectiveness.²⁵⁹ Military leaders also "have a degree of familiarity with, and authority over, their [subordinates] that is **unparalleled**,"²⁶⁰ even in the schools. What new recruit has not heard the noncommissioned or petty officer in charge announce, "*I am now your father, mother, sister, and brother!*"? This combination of exceptional disciplinary needs and command relationships clearly favors applying *T.L.O.*'s discipline exception to the military.

The Military Rules of Evidence provide that a "search ... not requiring probable cause ... may be conducted when permissible under the Constitution of the United States as applied to members of the armed **forces**."²⁶¹ Consequently, if the Court of Military Appeals held the *T.L.O.* exception applicable to the military, the Military Rules of Evidence would encompass the new rule. Moreover, the authority of commanders would be strengthened while reducing any friction between the constitutional interpretations of the Court of Military Appeals and the Supreme Court.²⁶²

²⁵⁸105 S. Ct. at 748 (Powell, J., and O'Connor, J., concurring).

²⁵⁹See, e.g., Dep't of Army, Field Manual No. 22-100, Military Leadership, at 3, 17, 32, 42, 44, 47, 49, 55, 57, 88, 124, 129, 140, 147, 215 (31 Oct. 1983).

²⁶⁰105 S. Ct. at 747.

²⁶¹Mil. R. Evid. 314(k).

²⁶²Recent amendments to Military Rules of Evidence 304 and 311 have kept up to date with Supreme Court announcements. The amendments incorporate both the inevitable discovery doctrine of *Nix v. Williams*, 104 S. Ct. 2501 (1984), and the good faith exception of *United States v. Leon*, 104 S. Ct. 3405 (1984). See Exec. Order No. 12,550, 51 Fed. Reg. 6497 (1986) (promulgating C2, MCM, 1984).

Nevertheless, it has already been argued that because *Stuckey* exempts commanders from the neutral magistrate requirement, they cannot take advantage of the *Leon* exception which excused a magistrate's mistake because he was truly neutral and acting in good faith. See Vienna & Chema, *United States v. Leon: Good Faith and the Military Commander*, 25 A.F.L. Rev. 95 (1985).

Nevertheless, if the court adopted the discipline exception, while the present Military Rules of Evidence remained unchanged, some unique opportunities to resolve the "inspection v. search" problem could be lost. Therefore, the discipline exception and its underlying theories should be incorporated into the Military Rules of Evidence. The practical problems that could be solved by formally incorporating the discipline exception into the Military Rules of Evidence can best be understood by discussing each of the needed changes in turn.

A. RULE 315

Applying *T.L.O.* to the military would not do away with the need for probable cause searches under Rule 315. By reserving the question of how police participation would affect its **ruling**,²⁶³ the Court made it clear that it was not extending the discipline exception to law enforcement agencies. Military law enforcement officials would still need to obtain a proper search authorization from a commander or magistrate before conducting a search.

Moreover, a strict adherence to the discipline rationale would prevent personnel that were outside the chain of command from conducting *T.L.O.*-type searches. Thus, a billeting officer would have to obtain a search authorization under Rule 315 before searching an occupied room in his facility.²⁶⁴

B. RULE 314

On the other hand, the Supreme Court's two-pronged reasonableness analysis would naturally fall under Rule 314, which covers searches not requiring probable cause.²⁶⁵ A new paragraph could be added describing the specific requirements of the discipline exception. The following formulation is **proposed**:²⁶⁶

Maintaining a theory of constitutionality different from that used by the Supreme Court can only result in similar debates in the future.

²⁶³105 S. Ct. at 744 n.8.

²⁶⁴An argument could be made that a commander cannot authorize a search as a disciplinary authority if law enforcement personnel seek what is essentially a warrant. Nevertheless, the Supreme Court's citation of *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976), indicates that the Court might impose only the probable cause requirement, rather than the full ramifications of the warrant requirement, under such circumstances. Rule 315 satisfies that requirement.

²⁶⁵Mil. R. Evid. 314.

²⁶⁶Changes to the present Military Rules of Evidence are indicated as follows: Deleted language is struck out, new language is underlined, and relocated language is placed between = signs.

Rule 314. Searches not requiring probable cause

....

(k) Searches based on reasonable suspicion. A person subject to the code who is not acting in conjunction with any law enforcement agency, except as provided in paragraphs (b) (2), and (c) of Mil. R. Evid. 313, and who has _____ to su that the conduct of another i subject to the code meets t requirements of military discipli may b tl t other person or his property if

(1) he has reasonable grounds for believing that the search will produce evidence that the person has violated or is violating the law or military rules, regulations, or orders. and

(2) he searches in a manner that is reasonably related to the nature of the evidence sought and not excessively intrusive in light of all the circumstances.

(l) Other searches. A search of a type not otherwise

Just as **T.L.O.** authorized all teachers to search students “under their **authority**,”²⁶⁷ the proposed rule would allow a squad leader to search one of his men if he had the requisite suspicion. Language for the two-pronged reasonableness test of the proposed rule is modeled after the Court’s opinion in **T.L.O.** Because the Court did not extend the exception to searches involving law enforcement agencies, the rule specifically excludes such searches, thus placing them back within the purview of Rule 315. However, the proposed rules do allow for limited law enforcement involvement in conjunction with inspections.

C RULE 313

The following changes are proposed to the inspection provisions of Rule 313,²⁶⁸ to make them consistent with the proposed search rules.

²⁶⁷105 S. Ct. at 743.
²⁶⁸Mil. R. Evid. 313(b).

Rule 313. Inspections and inventories in the armed forces

(b) Inspections. When performed in accordance with (1) and (2) below, an inspection may include [An inspection"—is] an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, [conducted as an incident of command and the primary purpose of which is] to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may be designed [include but is not limited to an examination to determine and] to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection may also include[s] an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible if made in accordance with this rule. [An examination made for the primary purpose of obtaining evidence for use in a trial by court martial or in other disciplinary proceedings is not an inspection within the meaning of this rule.] An examination is an inspection under this rule if—

(1) it is conducted in accordance with an inspection plan clearly established by regulation, order or other directive from competent authority designed to inform those subject to being inspected of the standards they are to meet and of the general time, place, manner, and frequency of inspections, such as whether they will be unannounced, and

(2) the method of examination is reasonably related to determining compliance with the established standards and is not excessively intrusive under all the circumstances. =Inspections [shall be conducted in a reasonable fashion and] shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid, including aids furnished or handled by law enforcement agencies, and may be conducted with or without notice to those inspected. Unlawful weapons,

contraband, or other evidence of crime located during an inspection may be seized.=

(c) Examinations involving individualized suspicion. If an examination appears to have been prompted by individualized suspicion, such as when ~~a purpose of an examination is to locate weapons or contraband, and if~~: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and **was** not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence either that the examination was an inspection within the meaning of this rule, or that during such an inspection reasonable suspicion **arose** justifying the examination under Mil. R. Evid. 314(k). If reasonable suspicion arises during a valid inspection, a search may be authorized under Mil. R. Evid. 314(k)(1) or (k)(2) despite the involvement of a law enforcement agency, provided that its only role was to furnish or handle natural or technological aids during the inspection.

These proposed changes, and those to Rule 314, provide a consistent means of determining the reasonableness of a government intrusion upon the privacy and property rights of military personnel, whether the intrusion is called an inspection or a search. For an intrusion to be reasonable under the proposed Rule 313, it must be justified at the outset either by reasonable suspicion as defined in **T.L.O.** or by adherence to other protections provided in an established inspection plan.

The proposed rules continue to use the labels “inspection” and “search,” but they recognize that the only difference is the degree of suspicion involved. An “inspection” will not ordinarily involve any individualized suspicion at **all**, but will be based on a general suspicion derived from the knowledge that standards are not ordinarily maintained unless compliance with them is frequently checked and enforced. On the other hand, the term “search” describes an examination prompted by reasonable suspicion, **as** defined in **T.L.O.** or by probable cause.

The proposed rule deletes any attempt to distinguish searches from inspections on the basis of "**purpose**."²⁶⁹ Accordingly, it converts the former definition of an inspection into illustrative language **as** a guide to the kinds of examinations which could qualify under the new standard.

In **T.L.O.** the Supreme Court reaffirmed that when suspicion is not individualized "other safeguards" must ensure that individual rights are not subject to the unfettered discretion of the enforcement officer.²⁷⁰ The Court derived this rule from its inspection cases, the latest of which, *Donouan v. Dewey*,²⁷¹ upheld an inspection scheme on the basis of the "other protections" provided in the authorizing statute. Those other protections included clear standards, an indication of when inspections were to be done, and a preclusion of excessive intrusions.

The proposed changes to Rule 313 incorporate this approach, recognizing that almost without exception military units have established inspection plans that satisfy these constitutional standards. The proposed rule incorporates the *Dewey* standards into a two-pronged reasonableness test for inspections similar to the proposed **rule** for searches under the discipline exception.

In addition to adopting a two-pronged test, the proposed change incorporates the provisions of the present contraband inspection rule into a new paragraph that specifically correlates inspections with searches under the discipline exception. The present contraband inspection rule already recognizes that the essential difference between an "inspection" and a "search" is the degree to which suspicion has become individualized.

For example, the present contraband inspection rule raises a presumption that an examination was a search rather than an inspection when "(1) the examination was directed immediately following a report of a specific offense in the unit . . . and was not previously scheduled." Such circumstances tend to show that the examination was conducted upon individualized suspicion, and also indicate that it was not conducted as part of **an** established inspection scheme.

²⁶⁹Inventories involve accounting for items of property that have lawfully come into the possession of the government. Such listings are done to protect the owner from loss, to protect the government from false claims, and to ensure the safety of the custodians and the public. See Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95, 102 (1985). Because, unlike inspections, they have no enforcement purpose, no changes are proposed to the inventory rules.

²⁷⁰105 S. Ct. at 744 n.8.

²⁷¹452 U.S. 594 (1981).

The presumption that a search rather than an inspection has occurred is also raised when “(2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination.” These circumstances would also strongly suggest that the examination was motivated by individualized suspicion.

The present contraband inspection rule provides that the presumption of irregularity can be overcome if the government proves a proper inspection by clear and convincing evidence. The higher burden in such situations compensates for the possibility that an individualized examination could be conducted under the pretense that it was a proper inspection.

Despite eliminating the purpose distinction, the new rules must deal with the same subterfuge problem. Even under the proposed rules, a commander could initiate an individualized examination without reasonable suspicion, under the pretense that it was part of an established inspection plan. Therefore the proposed rule utilizes the same presumption and elevated standard of proof as that used in the present rules. The only difference is that under the proposed rule the availability of the presumption is not restricted to examinations for contraband and weapons.

Additionally, the proposed rule anticipates that a legitimate inspection could uncover evidence that could prompt the inspecting official to make a greater-than-planned intrusion. The proposed rules contemplate that if the new evidence actually supports reasonable suspicion, an individualized search in compliance with the **T.L.O.** standards may be conducted without interruption. In such a case, the proposed rule requires the government to prove that either (1) the entire examination was justified as an inspection, or (2) the individual examination was based upon reasonable suspicion, and that the evidence supporting such suspicion was discovered during a valid inspection.

The clear and convincing evidence standard is necessary for both elements because it would be impossible to administer a different standard of proof for the search than for the underlying inspection. Moreover, the possibility of pretense would be just as great. It would be just as easy to pretend that reasonable suspicion arose after an examination began as it would be to pretend that the whole thing was a preplanned inspection.

The proposed rule also addresses the situation where law enforcement personnel participate in a challenged inspection.

T.L.O. questioned whether the discipline exception applied when law enforcement agencies were involved in a search. The typical example of law enforcement involvement in military inspections is where the agency furnishes and handles drug detection dogs.

The proposed rules retain the provision allowing the use of such “natural and technological aids” during inspections, even when handled by law enforcement personnel, on the theory that the established regulations and inspection plans can and do provide the necessary safeguards to render such limited participation reasonable.

Therefore, because the nature of such participation is equally limited regardless of whether reasonable suspicion develops during the inspection, there is no reason why such limited participation should invalidate a *T.L.O.*-type search if reasonable suspicion does arise. The proposed rule therefore allows searches to proceed in such cases provided that the law enforcement agency does nothing more than furnish or handle the “aids” used in the inspection.

D. RULE 316

Rule 316²⁷² explains when property can be seized. The following addition to this rule will prevent any question about when property can be seized under the discipline exception.

Rule 316. Seizures

....

(d) Seizure of property or evidence.

..

(4) Reasonable suspicion. Property observed in the course of a search conducted in accordance with Mil. R. Evid. 314(k) may be seized if it reasonably appears to be contraband or evidence of a crime.

~~(5)~~ Other property. ...

~~(6)~~ Temporary detention. ...

The standard for seizing property discovered during a discipline search was not discussed in *T.L.O.*, and would be unlikely to arise, except that the present seizure rule specifies a probable cause

²⁷²Mil. R. Evid. 316.

standard for all seizures. Because an intrusion under the discipline exception requires only reasonable suspicion to be valid, the proposed change simply carries the same reasonableness standard through to a resulting seizure.

X. CONCLUSION

In *Ezell*, *Fimmano*, and *Stuckey* the Court of Military Appeals struggled with the difficulty of applying civilian fourth amendment standards to military commanders. In *Stuckey* the court ultimately retreated from attempting to apply the constitutional rules created for civilians, and risked friction with the Supreme Court by interpreting the amendment itself to allow what had formerly been allowed under the "separate constitutional standards" approach to military law. Nevertheless, the theory of *Stuckey* eventually did curtail previous practice by concentrating search authorization power in the commander²⁷³ when traditional practice had been to allow delegation.²⁷⁴

Nevertheless, the Supreme Court's recently announced discipline exception not only fits the military perfectly, but provides the means of resolving several practical problems and of placing the military within the generally applicable provisions of the fourth amendment. This would, in turn, resolve any differences between the Court of Military Appeals' interpretations of the amendment and those of the Supreme Court.

The discipline rationale of *T.L.O.* would allow any military leader within a chain of command to order or conduct a search of his direct subordinates or their property. The proposed rules implement this provision. Of course, if the services desire to regulate this authority, they may do so.

Adoption of the proposed rules would provide a consistent approach in dealing with government intrusions upon the privacy and property rights of military personnel. The key would be whether the intrusion was reasonable at its inception, and whether its scope was reasonably related to the justified purposes for which it was initiated. Such an approach is clearly in line with Madison's injunction in the *Federalist* to first assess the need for a governmental power, and then to ensure that it was not extended too far.²⁷⁵ It is also easily understandable by "lay"

²⁷³See *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981).

²⁷⁴See *Quinn, Some Comparisons Between Courts-Martial and Civilian Practice*, 46 *MIL. L. REV.* 77, 92 (1969).

²⁷⁵"See *The Federalist* No. 41 (J. Madison).

commanders, and avoids the artificial “purpose” distinctions that exist under the present rules.

The discipline exception would also prevent the kind of technical difficulties experienced in the *Brown* case in 1953, when Judge Latimer concluded that the commander would have been derelict in his duty if he had not conducted a search, although he did not have a level of suspicion equal to what the Supreme Court had defined in a civilian context to be “probable cause.”

Furthermore, the proposed rules would resolve the problem of a commander having to stop and contact his next higher commander every time something came up during an inspection that gave him reasonable grounds to believe he would find evidence of an offense if he dug a little deeper, or looked somewhere he hadn’t originally planned on.

The rationale for the *T.L.O.* exception now offers an approach for determining the reasonableness of an intrusion upon the privacy, and property rights of military personnel that is itself consistent and reasonable. Moreover, by applying it, the military can finally complete the job of placing military search and seizure law squarely within the generally applicable interpretations of the fourth amendment.

RULE FOR COURTS-MARTIAL 707: THE 1984 MANUAL FOR COURTS-MARTIAL SPEEDY TRIAL RULE

by Major Chris G. Wittmayer*

In the 1984 revision of the Manual for Courts-Martial, the President¹ has promulgated a new speedy trial rule for military justice practice, Rule for Courts-Martial (R.C.M.) 707. Rule 707 requires that **an** accused be brought to trial within **120** days after imposition of pretrial restraint or notice of preferral of charges, whichever is earlier.² The rule also provides, however, that certain periods of time are excluded from the 120 day period.³ The remedy if the Government fails to timely bring an accused to trial is dismissal of the charges with prejudice.⁴ The rule also contains a ninety day provision: no accused may be held in pretrial arrest⁵ or confinement in excess of ninety days.⁶

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¹The Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984] is promulgated by executive order of the President, Exec. Order No. 12473, 3 C.F.R. 201 (1985), under the authority of the President as Commander in Chief of the armed forces, U.S. Const. art. 11, § 2, cl. 1, and under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

²MCM, 1984, Rule for Courts-Martial 707(a) [hereinafter R.C.M.]

³R.C.M. 707(c).

⁴R.C.M. 707(e) and analysis. The 1984 Manual for Courts-Martial is organized with three tiers of authority: the binding rules for courts-martial promulgated by executive order of the President, a nonbinding "discussion" promulgated by the Department of Defense which accompanies each rule, and **an** extensive "analysis" section that sets forth the nonbinding views of the drafters. *See* MCM, 1984, app. 21.

⁵"**Arrest**" in military practice is a type of pretrial restraint under which a person is directed to remain within specified limits, such as the accused's room in the barracks. R.C.M. 304(a)(3). A person in the status of arrest is precluded from performing full military duties. *Id.* Arrest is rarely used. "Restriction" under R.C.M. 304(a)(2) to less onerous specified limits is common. A service member under restriction, normally performs his or her usual military duties. R.C.M. 304(a)(2).

⁶R.C.M. 707(d).

R.C.M. 707 is based' on the American Bar Association Standards for Criminal Justice on speedy trial⁸ and is a significant change in military practice. The 1969 Manual for Courts-Martial did not set a specific time period for bringing an accused to trial. This article will review R.C.M. 707 to determine its intended meaning and examine the decisions that have construed it since August 1, 1984, when it took effect.⁹ Problem areas in the rule and errors of courts in construing the rule will be discussed.

I. THE 120 DAY RULE AND TRIGGERING EVENTS

R.C.M. 707 requires that an accused be brought to trial within 120 days after notice of preferral or imposition of pretrial restraint, whichever is earlier. Specifically, R.C.M. 707(a) states: "The accused shall be brought to trial within 120 days after the earlier of (1) Notice to the accused of preferral of charges under R.C.M. 308; or (2) The imposition of restraint under R.C.M. 304(a)(2)-(4)."

"Notice ... of preferral of charges under R.C.M. 308" occurs when the immediate commander of the accused informs, or "causes" the accused to be informed of the charges that have been preferred.¹⁰ "Preferral" of charges is the act of formally charging a suspect with specific offenses.¹¹ Notice of preferral is to occur "as soon as practicable" after preferral of charges¹² and should typically occur the same day as preferral or the next day.

"[R]estraint under R.C.M. 304(a)(2)-(4)" includes three of the four kinds of pretrial restraint recognized in the Manual: "restriction" to specified limits, "arrest," and pretrial "confinement."¹³ When first promulgated, the 120 day rule was also triggered by restraint under R.C.M. 304(a)(1), called "conditions on liberty."¹⁴ Conditions on liberty is defined as "orders directing a person to do or refrain from doing specified acts."¹⁵ Conditions on liberty would include an order not to go to the scene of an alleged offense or not to approach an alleged victim or potential witnesses.¹⁶

⁸R.C.M. 707 analysis.

⁹Standards for Criminal Justice (1978).

¹⁰See Exec. Order No. 12473, 3 C.F.R. 201 (1985).

¹¹R.C.M. 308(a).

¹²R.C.M. 307.

¹³R.C.M. 308(a).

¹⁴R.C.M. 304.

¹⁵R.C.M. 707 analysis.

¹⁶R.C.M. 304(a)(1).

¹⁷R.C.M. 304 discussion.

Conditions on liberty as a specific type of pretrial restraint was first named and defined in the 1984 Manual.¹⁷ Change 2 to the 1984 Manual for Courts-Martial removed conditions on liberty as a type of restraint that triggered the running of the 120 day rule.¹⁸ The amended analysis to rule 707 states the change was made because the “minimal infringement on liberty imposed by [conditions on liberty] . . . [does] not warrant imposition of the speedy trial requirements.”¹⁹

R.C.M. 707 applies to *all* trials by courts-martial, regardless of the level of court, be it summary court-martial, special court-martial, or general court-martial.²⁰

Delay from the time of an offense to preferral of charges or imposition of pretrial restraint is not considered under R.C.M. 707.²¹ The statute of limitations provides time limits that apply to this earlier period.²² Delay before imposition of restraint or preferral of charges can also raise an issue of the denial of due process.²³

11. REVIEW AND CRITIQUE OF THE TRIGGERING EVENTS OF R.C.M. 707(a)

R.C.M. 707(a)'s statement of the general 120 day rule and the triggering events of notice of preferral or imposition of restraint present few problems. The specified triggering events do, however, raise issues on the coverage of the rule in three circumstances: when notice of preferral is significantly delayed after preferral of charges, when restraint is imposed without authority, and when “administrative” restraint is imposed. The 1986 change to the rule, which removed “conditions on liberty” from the list of restraints that trigger the speedy trial rule, also merits discussion. To date, one court of military review opinion has addressed an issue on the triggering of the rule: When does the 120 day period begin if a service member is first restrained by civilian authorities on civilian charges?²⁴

¹⁷R.C.M. 304 analysis.

¹⁸R.C.M. 707 analysis.

¹⁹*Id.*

²⁰*Id.*

²¹R.C.M. 707 discussion and analysis.

²²R.C.M. 707 discussion.

²³R.C.M. 707 discussion and analysis: see also *United States v. Marion*, 404 U.S. 307 (1971) (“the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an ‘accused’”; prior to that time, the requirement of due process provides protection).

²⁴*United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986).

A. DELAYED NOTICE OF PREFERRAL

One potential problem area arises under R.C.M. 707(a) when there is a significant delay from preferral of charges until notice to the accused of preferral. Delayed notice of preferral should be uncommon, but it does occur.²⁵ This delay would not be counted within the 120 day period, even though charges have been brought. When the delay in giving formal notice of preferral is significant, and when the accused or others learn of the charges before formal notice, policies underlying the right to a speedy trial would be implicated. As the Supreme Court has noted in the context of the sixth amendment, the right to a speedy trial protects an accused from the anxiety of unresolved charges and from "public scorn."²⁶ Because of the possibility of delayed notice of preferral, and with little change in the general effect of the 120 day rule, it might be better if the rule ran from preferral of charges rather than from notice of preferral.

An opposing concern would arise in the odd case in which charges were preferred, but were not promptly forwarded to the chain of command for timely processing, as when a victim subject to the Uniform Code of Military Justice prefers charges.²⁷ This concern, however, is partially undercut by the requirement that a person preferring charges sign the charges under oath before a commissioned officer authorized to administer oaths.²⁸ This odd preferral situation might also be handled by dismissal of the charges and a new preferral of charges after the immediate commander's preliminary inquiry,²⁹ or through application of the residual exclusion from the 120 day period for "good cause."³⁰ These provisions will be discussed later.

²⁵*See, e.g.*, United States v. Gray, 21 M.J. 1020 (N.M.C.M.R.) (notice of preferral occurred 13 days after preferral), *petition granted*, 23 M.J. 285 (C.M.A. 1986).

²⁶Dickey v. Florida, 398 U.S. 30, 41 (1970) (Brennan, J., concurring); *see also* Barker v. Wingo, 407 U.S. 514, 537 (1972) (White, J., concurring); United States v. Marion, 404 U.S. 307, 320 (1971).

²⁷Typically, the soldier's immediate unit commander prefers charges, after a preliminary inquiry into a report of an offense. R.C.M. 303 and 301. Nevertheless, any person subject to the Uniform Code of Military Justice may prefer charges. R.C.M. 307. United States v. Gray, 21 M.J. 1020 (N.M.C.M.R.), *petition granted*, 23 M.J. 285 (C.M.A. 1986), notes this concern: "[A]ny person subject to the UCMJ can prefer charges, but such preferral does not signal the Government's institution of formal charges." 21 M.J. at 1024 (emphasis by the court).

²⁸UCMJ art. 30; R.C.M. 307(b)(1).

²⁹*See* R.C.M. 707(b)(2) (if charges are dismissed, time shall run only from the date on which charges are reinstituted or restraint is imposed).

³⁰*See* R.C.M. 707(c)(8) (exclusion of any period of delay "for good cause").

B. IMPOSITION OF ADMINISTRATIVE RESTRAINT

Another potential problem area concerns the imposition of "administrative **restraint**."³¹ R.C.M. 304(h) recognizes that limitations may be placed on service members for purposes other than military justice. Examples include restraint for operational or medical reasons.³² Administrative restraint does not trigger the 120 day rule. Courts, however, should closely scrutinize any restraint imposed on a soldier pending trial to determine whether it serves purpose wholly independent of military justice or whether it substitutes for pretrial restriction, arrest or confinement.

C. IMPOSITION OF PRETRIAL RESTRAINT WITHOUT AUTHORITY

A third potential problem area under R.C.M. 707(a) involves pretrial restraint imposed without authority.³³ Imposition of pretrial restraint under R.C.M. 304 requires action by proper authority. Any commissioned officer may order the pretrial restraint of any enlisted **person**.³⁴ A commanding officer may delegate authority to impose pretrial restraint on enlisted persons to noncommissioned officers.³⁵ Superior authority may also withhold authority from subordinates.³⁶ An issue arises when a soldier is placed under pretrial restraint by a person who does not have authority under R.C.M. 304 to impose the restraint. An example would be when a noncommissioned officer, the soldier's platoon sergeant for instance, orders the soldier to remain within some specified limits pending investigation of an alleged offense. The soldier complies with the restriction, but the sergeant had no delegated authority to impose the restriction, or the commander had specifically withheld authority. Restraint "under R.C.M. **304**" was not imposed, but the effect on the soldier's freedom of movement was the same. In these circumstances, the 120 day rule should be triggered. The commander can insure he or she is aware of any pretrial restraint by personally directing any restraint that

³¹R.C.M. 304(h).

³²*Id.*

³³This issue is noted in Criminal Law Division, The Judge Advocate General's School, Army, *The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues*, The Army Lawyer, July 1984 at 1, 20.

³⁴R.C.M. 304(b)(2).

³⁵R.C.M. 304(b)(3).

³⁶R.C.M. 304(b)(4).

is appropriate when charges are being considered or advising the suspected soldier and the chain of command that no restraint will be imposed.

D. REMOVING "CONDITIONS ON LIBERTY" FROM TRIGGERING THE RULE

The analysis to the 1986 amendment of R.C.M. 707, which eliminated "conditions on liberty" as an event triggering the 120 day rule, states that the change was made "because the minimal infringement on liberty imposed by such conditions . . . [does] not warrant imposition of the speedy trial requirements."³⁷ The analysis cautions, however, that when a greater restraint such as restriction, is "erroneously denominated as a condition on liberty," the speedy trial rule will **apply**.³⁸ Another likely reason underlying this change was that the Government lost cases on speedy trial issues when orders amounting to conditions on liberty were imposed and no one realized the speedy trial rule had been triggered.³⁹

This change is a reasonable policy choice, given the minimal restraint generally involved. It is arguable, however, that a preferred solution, which would have retained the clarity of having all four recognized types of restraint trigger the rule, would be the education of commanders and prosecutors to be alert to speedy trial requirements and their triggering events. As now drafted, a suspect under particularly onerous conditions on liberty that do not rise to the level of restriction would have no speedy trial protection under R.C.M. 707, even though significant liberty interests may be impinged. An example of an onerous condition on liberty not amounting to restriction would be ordering a soldier to move out of family quarters and to stay away from his family in a case in which an offense is alleged against a family member.⁴⁰ Given the possibility of such restrictive conditions, it is at least arguable that the speedy trial requirement of R.C.M. 707 should apply to conditions on liberty.

³⁷R.C.M. 707 analysis (C2, 15 May 1986).

³⁸*Id.*

³⁹*Cf. Note, The Silent Enemy, The Army Lawyer*, July 1985, at 38.

⁴⁰See *United States v. Hulsey*, 21 M.J. 717 (A.F.C.M.R. 1985) (condition on liberty imposed requiring sergeant to live in barracks and not to go to his family quarters because of allegations of sexual misconduct with his daughter).

E. CASE ON CIVILIAN RESTRAINT

In *United States v. Cummings*,⁴¹ the Navy-Marine Court of Military Review addressed the issue of when military accountability under the 120 day rule begins if a service member is initially confined by civilian authorities on civilian charges. The court stated that time does not begin to run under the 120 day rule until notification to the military of the service member's availability and a reasonable time thereafter to arrange for transportation to service confinement facilities.⁴² In *Cummings*, the court marked military accountability from the day after the military received notice that *Cummings* was available for pick-up by military authorities.⁴³ From that time, *Cummings* was being confined by civilian authorities based on possible military charges and military authorities were aware of the confinement. In essence, military pretrial restraint within the meaning of the 120 day rule began when *Cummings* was held for the military and with the knowledge of military authorities.

111. COUNTING THE 120 DAY SPEEDY TRIAL PERIOD

In counting the 120 days of the speedy trial period, the day of the triggering event, notice of preferral or imposition of restraint, is not counted, but the day the accused is brought to trial is counted:

The date on which the accused is notified of the preferral of charges or the date on which pretrial restraint is imposed shall not count for purpose of computing the time under subsection (a) [the 120 day period] of this rule. The date on which the accused is brought to trial shall count.⁴⁴

In computing speedy trial periods, calling the day of the triggering event "day zero" can aid clarity.

An accused is "brought to trial" within the meaning of the rule when "a plea of guilty is entered to an offense; or . . . presentation to the factfinder of evidence on the merits begins."⁴⁵

⁴¹21 M.J. 987 (N.M.C.M.R. 1986).

⁴²*Id.* at 988.

⁴³*Id.* at 990.

⁴⁴R.C.M. 707(b)(1).

⁴⁵R.C.M. 707(b)(3).

When multiple charges are brought against an accused at different times, the rule provides a separate speedy trial period for each charge: “**Multiple charges.** When charges are preferred at different times, the inception for each shall be determined from the date on which the accused was notified of preferral or on which restraint was imposed on the basis of that offense.”⁴⁶

In a more difficult and problematic provision, the rule states: “**Inception.** If charges are dismissed, if a mistrial is granted, or—when no charges are pending—if the accused is released from pretrial restraint for a significant period, the time under this rule shall run only from the date on which charges or restraint are reinstituted.”⁴⁷

IV. REVIEW AND CRITIQUE OF THE COUNTING PROVISIONS OF THE 120 DAY RULE

The counting provisions of the rule for determining when the speedy trial period begins and the end of the period when the accused is brought to trial are straightforward and clear. One case, from the Army Court of Military Review, has construed the multiple charge provision. The “inception” provision is difficult and raises substantial problems.

A. MULTIPLE CHARGES

Under the rule, when multiple charges are brought at different times there is a separate speedy trial period for each charge. The separate speedy trial “clock” runs from the earlier of notice of preferral of the charge or from imposition of restraint based on the offense that underlies the charge. This fairly clear provision was discussed by the Army Court of Military Review in *United States v. Boden*.⁴⁸ Army Private Boden was apprehended and confined pending trial for several drug offenses.⁴⁹ Two charges against Boden were preferred the day after Boden was put in pretrial confinement, but an additional charge was not preferred until a month and a half later.⁵⁰ The original charges were not brought to trial within the speedy trial period, counting from the

⁴⁶R.C.M. 707(b)(4).

⁴⁷R.C.M. 707(b)(2).

⁴⁸21 M.J. 916 (A.C.M.R.1986).

⁴⁹*Id.* at 917.

⁵⁰*Id.*

imposition of pretrial confinement, and were dismissed.⁵¹ The additional charge, however, was timely brought to trial *if* time was counted only from the notice of preferral of the additional charge.

In considering these facts, the court stated, first, that the separate clock provision for multiple charges does *not* apply to cases in which there is pretrial confinement.⁵² The court also stated that when there is pretrial confinement, Government accountability begins on the date “the government has in its possession substantial information on which to base preferral.”⁵³ The court found in *Boden* that the Government possessed “substantial information” on which to base preferral of the additional charge at the time Boden was confined on the original charges. Thus, the additional charge was also beyond the speedy trial period.⁵⁴

The conclusion in *Boden* that the additional charge was also beyond the speedy trial limit appears correct, but the statements of the court in reaching that conclusion lack clarity. The correct analysis, from the language of the multiple charge provision, would be that Boden's pretrial restraint was in part “imposed on the basis”⁵⁵ of the offense that resulted in the later additional charge, as well as being based on the original charges. Thus, time should run for *all* the charges from the imposition of restraint. The fact that the Government possessed “substantial information on which to base preferral” at the time restraint was imposed indicates this information formed a basis for the restraint. When the Government has information that contributes to a conclusion that restraint is necessary, Government accountability should run from the imposition of restraint, not from a later preferral. It is not correct to conclude, however, that the multiple charge provision does not apply to cases involving confinement. If information concerning *an* additional offense is not *known* to the Government when confinement or other restraint is imposed, a separate clock for a later charge could properly run from the earlier of notice of preferral of the additional charge, or from the time when information was *known* to the Government which

⁵¹*Id.* *Boden* involved the 90 day provision of R.C.M. 707(d), which applies when an accused is in pretrial arrest or confinement. The application of the multiple charge provision of R.C.M. 707(b)(4), however, should be the same under the 120 day rule when lesser pretrial restraint is involved.

⁵²21 M.J. at 917.

⁵³*Id.* at 918.

⁵⁴*Id.*

⁵⁵R.C.M. 707(b)(4).

contributed to continued confinement or restraint.

B. THE "INCEPTION" PROVISION

R.C.M. 707(b)(2) states: "*Inception*. If charges are dismissed, if a mistrial is granted, or—when no charges are pending—if the accused is released from pretrial restraint for a significant period, the time under this rule shall run only from the date on which charges or restraint are reinstituted."

The analysis to the rule states this provision is based on ABA Standards §§ 12-2.2(b) and (c).⁵⁶ ABA Standard 12-2.2, captioned "When time commences to run," reads in pertinent part:

The time for trial should commence running, without demand by the defendant, as follows:

....

(b) if the charge was dismissed upon motion of the defendant and thereafter the defendant was held to answer or charged with an offense, then the time for trial should commence running from the date the defendant was so held to answer or charged ... or

(c) if the defendant is to be tried again following a mistrial ... then the time for trial should commence running from the date of the mistrial⁵⁷

The commentary to the ABA Standard indicates that under this standard, time begins to run "anew" and is not merely tolled and later restarted.⁵⁸ In other words, time is *restarted at zero* under the prescribed circumstances. This apparently is the meaning of the R.C.M. 707(b)(2) language "time ... shall run *only* from"⁵⁹ the stated events. This result would be clearer if the rule were phrased "time ... shall be restarted at zero" instead of the current "time ... shall run only from" Apparently then, R.C.M. 707(b)(2) lets the Government restart the speedy trial clock at zero under certain circumstances.

1. Restart After Dismissal of Charges.

The first of the circumstances that permit the Government to restart the period is if "charges are **dismissed**."⁶⁰ If charges are

⁵⁶R.C.M. 707(b)(2) analysis.

⁵⁷"Standards for Criminal Justice § 12-2.2 (1978).

⁵⁸*Id.* commentary at 24.

⁵⁹R.C.M. 707(b)(2) (emphasis added).

⁶⁰R.C.M. 707(b)(2).

dismissed, time shall be restarted at zero "from the date on which charges or restraint are reinstituted."⁶¹ But should time be restarted at zero if dismissal is at the instance of the Government or if restraint continues? ABA Standard § 12-2.2(b) provides for the speedy trial clock to restart at zero only if charges are dismissed "upon motion of the defendant."⁶² The commentary notes that under the ABA Standards, dismissal on motion of the prosecutor merely tolls the running of the time.⁶³ The danger noted in the commentary and present in a straightforward reading of R.C.M. 707(b)(2) is that the Government can restart the clock at zero by the "simple device of dismissal and recharge."⁶⁴ The analysis to R.C.M. 707(b)(2) notes the change from the ABA Standard and states that no distinction is made whether the defendant or the prosecutor moves for dismissal, or if the dismissal is at the instance of the convening authority.⁶⁵ If the speedy trial rule of R.C.M. 707 is to have any effect, however, the Government should not be permitted to restart the clock at zero where dismissal is at the instance of the Government and substantially the same charge is brought later based on substantially the same facts previously known to the Government.

Dismissal of charges also should not restart the speedy trial period if restraint continues. The awkward phrasing of the rule that if charges are dismissed, time shall run "from the date on which charges or restraint are reinstituted" confuses this point. To clarify this, the rule should be redrafted to read that time shall run "from the date on which charges are reinstituted or, if restraint continues, from the date on which restraint was originally imposed."

2. Restart After a Mistrial.

The second circumstance that permits the Government to restart the clock at zero under R.C.M. 707(b)(2) is "if a mistrial is **granted**."⁶⁶ If a mistrial is granted, the time shall be restarted at zero, and again the language, "from the date on which charges or restraint are reinstituted."⁶⁷

⁶¹*Id.*

⁶²Standards for Criminal Justice § 12-2.2(b) (1978).

⁶³*Id.* commentary at 24.

⁶⁴*Id.*

⁶⁵R.C.M.707(b)(2) analysis. In military practice, the convening authority, with the advice of the staff judge advocate, exercises prosecutorial discretion.

⁶⁶R.C.M. 707(b)(2).

⁶⁷*Id.*

The ABA Standard provides that “following a mistrial” time should run “from the date of the mistrial.”⁶⁸ This language of the ABA Standard is much clearer than R.C.M. 707(b)(2). The R.C.M. 707(b)(2) requirement to restart the time when “charges or restraint are reinstituted” simply does not follow from a mistrial. A mistrial in military practice has the effect of withdrawing the charges from the **court-martial**,⁶⁹ but the charges do not need to be reinstituted by a repreferal; the same charges can be brought to trial before a new **court-martial**.⁷⁰ As with dismissal, restarting the speedy trial period after a mistrial also is not appropriate if restraint continues. More appropriate language for the rule, tailored for the circumstance of a mistrial, would be that if a mistrial is granted, time shall run under the rule from “the date of the mistrial or, if restraint continues, from the date on which restraint was originally imposed.”

3. Restart When Restraint is Lifted Prior to Preferal.

The third phrase of R.C.M. 707(b)(2) permits the Government to restart the speedy trial clock at zero “when no charges are pending—if the accused is released from pretrial restraint for a significant **period**.”⁷¹ Time then shall be restarted at zero from the date, and again we see the phrase, “on which charges or restraint are reinstituted.”⁷² No similar provision appears in the ABA Standards and nothing in the rule’s discussion or analysis explains the provision. The apparent meaning of the provision is that if no charges are pending against a suspect, and if the suspect is released from pretrial restraint for a “significant period,” then time shall be restarted at zero on the date charges are brought or restraint is reinstituted. The policy analysis would be that since no charges are yet pending, no speedy trial concern is yet raised by unresolved charges. And, while speedy trial interests are implicated by the initial imposition of restraint, those concerns dissipate when the suspect is released from pretrial restraint for a significant period of time. Thereafter, speedy trial interests are not again raised until a new triggering event occurs: the bringing of charges or new pretrial restraint. Clearly there is sense to this policy choice of the rule.

On the other hand, it could be argued that the speedy trial period should run from the time restraint of significant duration

⁶⁸Standards for Criminal Justice § 12-2.2(c) (1978).

⁶⁹R.C.M. 915(c)(1).

⁷⁰R.C.M. 915(c)(1) discussion; R.C.M. 915(c)(2).

⁷¹R.C.M. 707(b)(2).

⁷²*Id.*

is imposed, without an opportunity for the Government to restart the period at zero. If restraint of significant duration is imposed on a suspect, that restraint must be supported by probable cause that the person committed an offense triable by court-martial. If the restraint is properly supported, charges are also supported, and starting the clock with the restraint without an opportunity to restart the clock by lifting the restraint would ensure charges are timely brought when restraint is imposed. The rule, as drafted, however, has made a different policy choice. Accepting this policy choice, however, still leaves significant problems with the rule.

The first problem is again with the closing phrase that time shall run “from the date on which charges or restraint are reinstituted.” These conditions again simply do not follow from the predicate that no charges are pending and restraint is lifted for a significant period. The language should be tailored to fit the predicate and read that time shall run “from the date on which restraint is reinstituted or charges are brought.” This awkward language of the rule stems from lumping together the three circumstances of dismissal, mistrial, and the lifting of restraint into one sentence ending with the conclusion that time shall then run only from the date on which “charges or restraint are reinstituted.” As suggested above, this concluding phrase should be tailored to fit each of the three initial circumstances and the rule restructured into three related, but discrete elements.

Three appellate military courts have applied this third aspect of R.C.M. 707(b)(2). In *United States v. Hulsey*,⁷³ Air Force Staff Sergeant Hulsey was ordered to live in the barracks and not to go to his on-base family quarters pending investigation of allegations of sexual misconduct with his children.⁷⁴ This “condition on liberty” started the running of the 120 day speedy trial period as it was imposed prior to the 1986 amendment that removed conditions on liberty as a triggering event. Approximately two months later, Sergeant Hulsey was permitted to resume living in his family quarters.⁷⁵ Five days later, however, medical authorities intervened out of a concern that Sergeant Hulsey might repeat his sexual misconduct and Hulsey was again ordered to

⁷³21 M.J. 717 (A.F.C.M.R. 1985).

⁷⁴*Id.*

⁷⁵*Id.* at 718.

live in the barracks.⁷⁶ Charges were preferred against Hulsey a week after restraint was reimposed.⁷⁷

Applying R.C.M. 707(b)(2) to these facts, the Air Force Court of Military Review found that Hulsey's release from pretrial restraint was "not a subterfuge designed to circumvent R.C.M. 707," but an honest effort to permit him to return to the family residence.⁷⁸ The court also found that the five-day period of release from pretrial restraint was a "significant period" within the meaning of R.C.M. 707(b)(2). Thus, the Government's accountability under the speedy trial rule would be restarted at zero from the next triggering event: when pretrial restraint was reinstated.⁷⁹

Two important points concerning R.C.M. 707(b)(2) can be gleaned from *Hulsey*. First, the court added a requirement to the rule that there be no "subterfuge designed to circumvent R.C.M. 707" by the Government. In adding this additional element, the court recognized the danger that the Government could manipulate the rule by lifting pretrial restraint prior to bringing charges and, thus restart the speedy trial clock at zero. A further danger in the rule is that the Government might not only lift restraint in order to avoid the rule, but would intentionally delay bringing charges in order to insure a "significant period" of time had passed. In effect, the Government can manipulate the rule and benefit by further delaying a case.

The second point of importance from *Hulsey* is the court's approach to determining whether the period when restraint is lifted is "significant." While the court did not fully discuss its conclusion that five days was a "significant period," one factor it apparently considered important was the honest motivation of the Government. Since the motivation of the Government in lifting the restraint on Hulsey was genuine, Hulsey could reasonably feel the restraint would not shortly be reimposed and his anxiety would be lessened. The fact that medical authorities intervened shortly thereafter did not undercut this lessening of the anxiety interest during the five-day period. The medical concerns were apparently unexpected. Later, while charges were pending trial, Hulsey's restraint was again lifted and he was permitted to return to his family quarters. Here, what constituted a "significant period" depended not only on the length of the period, but on the

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

circumstances of the lifting of restraint. In policy terms the question is: are the circumstances and duration of the lifting of restraint such that the speedy trial concerns of anxiety and limitation on liberty are lessened to the extent that the **speedy** trial clock should return to zero? If so, the release from pretrial restraint is for a "significant period." Regardless of the circumstances of release, however, five days seems quite short to be a "significant period."

The Navy-Marine Court of Military Review applied **R.C.M. 707(b)(2)** in *United States v. Gray*.⁸⁰ In this case, marine Private Gray was placed in pretrial confinement the day he **assaulted** another marine.⁸¹ No charges were immediately preferred. After approximately a month in pretrial confinement, Gray was released.⁸² Not until a month after his release from pretrial confinement were charges preferred.⁸³ For some reason not reported in the opinion, notice of preferral of charges did not occur until approximately two weeks after preferral.⁸⁴ Gray **was** thus released from pretrial confinement for about a month **until** preferral, and 47 days passed after release from confinement to notice of preferral.⁸⁵

The issues before the court in *Gray* were whether this one-month period of release from confinement prior to preferral or the 47 days prior to notice of preferral was the pertinent period and whether the period was "significant" under **R.C.M. 707(b)(2)**. The bulk of the court's opinion discusses whether charges are "**insti-**tuted" upon preferral or upon notice of preferral. The language of the rule, which the court noted was "**awkward**,"⁸⁶ is that time shall run from the date on which charges are "**reinsti-**tuted."⁸⁷ Since no charges had yet been brought, the rule must mean when charges are "instituted." The question then is, are charges "instituted" upon preferral or upon notice of preferral? Because "preferral" is the act of charges being brought against a **suspect**,⁸⁸ it would seem that charges are "instituted" upon preferral. The court noted, however that any person subject to the Uniform Code of Military Justice could prefer charges, and thus

⁸⁰21 *M.J.* 1020 (N.M.C.M.R.), *petition granted*, 23 *M.J.* 285 (C.M.A. 1986).

⁸¹*Id.* at 1021.

⁸²*Id.*

⁸³*Id.* at 1024.

⁸⁴*Id.* at 1021.

⁸⁵*Id.* at 1024.

⁸⁶*Id.* at 1022, 1023.

⁸⁷*R.C.M. 707(b)(2)*.

⁸⁸*R.C.M.* 307.

preferral “does not signal the *Government’s* institution of formal charges.”⁸⁹ “Command formalization” of charges, the court concluded, occurred upon notice of preferral.⁹⁰ Thus, charges are “instituted” within the intended meaning of R.C.M. 707(b)(2), according to the court upon notice of preferral, not upon preferral.⁹¹

Having resolved that the period at issue was forty-seven days, rather than a month, the court turned to whether the time was a “significant period.” The court first noted that the defense had presented no evidence of improper motive on the part of the Government.⁹² Also, the court found preferral was appropriately delayed until medical reports were received on the severity and permanence of the injuries inflicted on the assault victim.⁹³ Given these circumstances, the court concluded the forty-seven days was a “significant period” and the Government could restart the 120 day speedy trial period at zero.

Gray illustrates the potential problems associated with delays between preferral and notice of preferral. It is clear under R.C.M. 707(a) that the initial running of the 120 day speedy trial period is from “notice to the accused of preferral of charges.”⁹⁴ It is less clear from the language of the “restart at zero” provision of R.C.M. 707(b)(2) that time is restarted upon notice of preferral rather than upon preferral. Since the vast majority of cases begin with preferral of charges by the accused’s immediate commander, the sounder choice would seem to be that preferral should be the time to start the speedy trial period, and to restart it under the stated circumstances of R.C.M. 707(b)(2). This would provide a clear and consistent start and restart point for the rule, would avoid the possibility that the Government could gain an advantage from delaying notice of preferral, and would avoid issues that might arise when an accused learns informally of charges that have been preferred but does not receive formal notice of preferral until a later date. Certainly the anxiety concern of the speedy trial rule is raised when an accused learns from any source that charges have been preferred. The accused’s concern does not wait until the later, formal notice of preferral. While it is also true that in a majority of cases an accused first learns of the charges upon formal notice of preferral, starting the speedy trial clock at

⁸⁹21 M.J. at 1024 (emphasis by the court).

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.*

⁹⁴R.C.M. 707(a)(1).

notice provides an incentive for the Government to delay notice of preferral.

The third case to consider R.C.M. 707(b)(2) did so only briefly. In *United States v. Turk*,⁹⁶ another panel of the Navy-Marine Court concluded, with little discussion, that eighteen days was a "significant period" and the speedy trial clock could be restarted.⁹⁶ The court stated in its opinion that "charges were not pending" until they were preferred.⁹⁷ With this focus on the language of the rule "when no charges are pending"⁹⁸ to explain the restart date of when charges are "reinstated," or more correctly "instituted," it may have been the view of this panel that the restart occurred with preferral, rather than notice of preferral. Here, as is typical, notice of preferral came the day after preferral, so little was at issue.⁹⁹

V. EXCLUSIONS FROM THE SPEEDY TRIAL PERIOD

While the Government must bring an accused to trial within the 120 day speedy trial period, R.C.M. 707(c) prescribes time periods that are excluded from the 120 day period. Potentially the most important of these is a residual or catchall exclusion for "good cause" under R.C.M. 707(c)(8). Also important and already the subject of considerable litigation is the exclusion of R.C.M. 707(c)(3) for "delay . . . at the request or with the consent of the defense." The biggest innovation for military practice may be the exclusion provided by R.C.M. 707(c)(5), which permits the Government to exclude time upon the Government's request if substantial evidence is as yet unavailable or if additional preparation time is needed by the Government due to the exceptional circumstances of the case.

R.C.M. 707(c) specifies the eight categories of time that are excluded from the speedy trial period as follows:

(c) *Exclusions.* The following shall be excluded when determining whether the period in subsection (a) [the 120 day period] of this rule has run—

(1) Any periods of delay resulting from other proceedings in the case, including:

⁹⁶22 M.J. 740 (N.M.C.M.R.), *petition granted*, 23 M.J. 156 (C.M.A. 1986).

⁹⁶*Id.* at 742.

⁹⁷*Id.*

⁹⁸R.C.M. 707(b)(2).

⁹⁹22 M.J. at 741.

(A) Any examination into the mental capacity or responsibility of the accused;

(B) Any hearing on the capacity of the accused to stand trial and any time during which the accused lacks capacity to stand trial;

(C) Any session on pretrial motions;

(D) Any appeal filed under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit; and

(E) Any petition for extraordinary relief by either **party**.

(2) Any period of delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances.

(3) Any period of delay resulting from delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

(4) Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual.

(5) Any period of delay resulting from a delay in the Article 32 hearing or a continuance in the court-martial at the request of the prosecution if

(A) The delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the prosecution's case when the Government has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time; or

(B) The continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

(6) Any period of delay resulting from the absence or unavailability of the accused.

(7) Any reasonable period of delay when the accused is joined for trial with a coaccused as to whom the time for trial has not yet run and there is good cause for not granting a severance.

(8) Any other period of delay for good cause, including unusual operational requirements and military exigencies.

The analysis to the rule states the exclusions are taken from the ABA Standards with modifications to conform to military procedure and terminology.¹⁰⁰ The analysis also notes¹⁰¹ that the exclusions generally parallel the exclusions available in the Federal Speedy Trial Act.¹⁰² To date, some exclusions have already been the subject of considerable litigation and appellate construction. Others have yet to be the subject of appellate comment. Here, each exclusion will be at least briefly reviewed in turn.

VI. REVIEW AND CRITIQUE OF THE EXCLUSIONS

A. *EXCLUSION (c)(1) FOR "OTHER PROCEEDINGS"*

R.C.M. 707(c)(1) excludes from the speedy trial period any delay "resulting from other proceedings in the case." "Other proceedings in the case" are defined in five categories: (A) examination into the mental capacity or responsibility of the accused; (B) any hearing on capacity and anytime during which the accused lacks capacity to stand trial; (C) pretrial motion sessions; (D) Government appeal, unless "totally frivolous"; and (E) petition for extraordinary relief by either party.¹⁰³ The ABA Standard¹⁰⁴ includes the substance of each of these exclusions, as does the Federal Speedy Trial Act.¹⁰⁵

The ABA Standard and the Speedy Trial Act make clear that their listed "other proceedings" are not exclusive, stating that "other proceedings" include, but are "not limited to" the listed categories.¹⁰⁶ R.C.M. 707(c)(1) omits this language, but a court could reach the same result by simply reading the word "includ-

¹⁰⁰R.C.M. 707 analysis.

¹⁰¹*Id.*

¹⁰²18 U.S.C. § 3161(h) (1982).

¹⁰³R.C.M. 707(c)(1).

¹⁰⁴Standards for Criminal Justice § 12-2.3(a) (1978).

¹⁰⁵18 U.S.C. § 3161(h)(1) (1982).

¹⁰⁶Standards for Criminal Justice § 12-2.3(a) (1978); 18 U.S.C. § 3161(h)(1) (1982).

ing" as open ended. The ABA Standard explicitly includes an additional category of "other proceedings" that R.C.M. 707(c)(1) does not mention: trial of other charges concerning the defendant.¹⁰⁷ The Federal Speedy Trial Act also includes additional "other proceedings" that generally have no application in **military** practice.¹⁰⁸

One case has construed the exclusion under R.C.M. 707(c)(1) for "other proceedings." In *United States v. Jones*,¹⁰⁹ the Navy-Marine Court of Military Review held that the exclusion for mental examination of the accused was not limited to mental examinations under R.C.M. 706, which provides specific procedures for a pretrial inquiry by a board to determine mental capacity or responsibility of an accused. In *Jones*, a psychiatric examination of Seaman Jones was requested by Jones' command.¹¹⁰ It was not clear that the request was specifically under R.C.M. 706.¹¹¹ Nonetheless, the court found the examination easily within the broad language of exclusion for "any examination into the mental capacity or responsibility of the **accused**."¹¹²

B. EXCLUSION (c)(2) FOR UNAVAILABILITY OF A MILITARY JUDGE BECAUSE OF EXTRAORDINARY CIRCUMSTANCES

R.C.M. 707(c)(2) excludes "delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances." The related ABA Standard has a somewhat different thrust and provides an exclusion for "exceptional circumstances" that result in "congestion of the trial **docket**."¹¹³ The exclusion under R.C.M. 707(c)(2) should apply when delay results from an unexpected illness, accident, or other "extraordinary" circumstance that precludes timely action by the judge assigned to the case. As a sufficient number of military judges are generally available, or can be made available, to timely try courts-martial, the exclusion should cover the time reasonably necessary to detail another judge and have the new judge take over the case.

¹⁰⁷Standards for Criminal Justice § 12-2.3(a) (1978).

¹⁰⁸18 U.S.C. §§ 3161(h)(1)(C), (G), (H), (I) and (J) (1982).

¹⁰⁹21 M.J. 819 (N.M.C.M.R. 1985).

¹¹⁰*Id.* at 822.

¹¹¹*Id.*

¹¹²R.C.M. 707(c)(1)(A).

¹¹³Standards for Criminal Justice § 12-2.3(b) (1978).

C. EXCLUSION (c)(3) FOR DELAY AT THE REQUEST OR WITH THE CONSENT OF THE DEFENSE

Under R.C.M. 707(c)(3), "any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense" is excluded from the speedy trial period. The language from the related ABA Standard provides for exclusion of "the period resulting from a continuance granted at the request or with the consent of the **defendant**."¹¹⁴

Several cases have construed exclusion (c)(3). In *United States v. Harris*,¹¹⁵ the Navy-Marine Court of Military Review considered a Government appeal from a dismissal of charges by the trial judge. From notice of preferral to trial, 122 days had elapsed.¹¹⁶ The Government argued, however, that a period of time could be excluded under R.C.M. 707(c)(3) because, during the pendency of the case, the defense submitted a proposed guilty plea agreement and negotiations began on a possible agreement.¹¹⁷ In submitting a proposed plea agreement and opening negotiations, the Government argued, the defense requested or consented to delay. The trial judge, however, found no express request for or consent to delay and, in fact, the Government conceded there was no express request for delay.¹¹⁸ On review, the court of review determined that a request or consent to delay by the defense would not be implied from pretrial agreement negotiations.¹¹⁹ The court noted that plea negotiations are a "normal incident" of military justice practice and the convening authority has sole discretion to accept or reject pretrial agreement offers.¹²⁰

*United States v. White*¹²¹ considered an informal exchange of communications between the prosecutor and defense counsel to schedule a case. The informal exchange began with the trial counsel notifying the defense that the Government was ready to proceed with the Article 32 pretrial investigation¹²² and request-

¹¹⁴*Id.* § 12-2.3(c).

¹¹⁵20 M.J. 795 (N.M.C.M.R. 1985).

¹¹⁶*Id.* at 796.

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.* at 797.

¹²¹22 M.J. 631 (N.M.C.M.R. 1986).

¹²²An Article 32 investigation is a preliminary hearing conducted by an impartial officer to determine the "truth of the matter set forth in the charges." UCMJ art.

ing that the defense contact the trial counsel to arrange a date.¹²³ The defense responded the next day and suggested they meet in five days to set a date for the investigation.¹²⁴ The Government counsel agreed to the suggested date, but when the day arrived, the defense cancelled the meeting.¹²⁵ A further informal exchange of communications between counsel followed, another meeting was set and cancelled, and the pretrial investigation was further delayed by the accused's release of civilian counsel and hiring of new counsel.¹²⁶

Reviewing the facts of *White*, the Navy-Marine Court concluded that the period from when the Government first notified the defense it was ready to proceed until the defense cancelled the first meeting was not within the exclusion for defense delay. The court reasoned that the "Government does not trigger defense delay merely by stating that it is ready to proceed . . .,"¹²⁷ "Furthermore, the defense did not impliedly consent to the delay . . . merely by suggesting" a convenient date to meet.¹²⁸ The court also noted that the Government's initial notice to the defense, requesting the defense contact the Government to set a date, did not schedule any "proceeding" within the meaning of R.C.M. 707(c)(3).¹²⁹ When the defense cancelled the meeting, however, the court concluded this was an "express 'request' of the defense."¹³⁰ And, while the "scheduled meeting . . . arguably can be said not to constitute a 'proceeding,' the failure of defense counsel to attend . . . did ultimately cause a delay in a proceeding (the Article 32 proceeding) since the purpose of the meeting was to set a date" for the Article 32 investigation.¹³¹

Surprisingly, the court complimented the trial counsel's handling of the scheduling of the case. The court stated that the trial counsel's "failure to docket a date certain for the Article 32 hearing . . . as soon as [trial counsel] . . . declared the Government ready to proceed, was not evidence of dilatoriness, but demonstrates . . . the Naval Service's tradition of the gentlemanly

32; R.C.M. 405. After the hearing or "investigation," the investigating officer makes a recommendation on an appropriate disposition of the charges. An Article 32 investigation is a prerequisite for a general court-martial. UCMJ art. 32.

¹²³22 M.J. at 633.

¹²⁴*Id.* at 633-34.

¹²⁵*Id.* at 634.

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Id.*

scheduling” of cases, “a tradition ... we desire to see continue.”¹³² The court specifically rejected the view that “when the Government is ready to go, they should docket the case,” reasoning that subsequent pretrial hearings before the judge to act on requests for continuances would waste time and resources.¹³³

Another panel of the Navy-Marine Court of Review applied White in *United States v. Butterbaugh*.¹³⁴ In *Butterbaugh*, the Government argued that it was defense delay when the Government notified the defense it was ready to proceed with the Article 32 hearing and requested a date from the defense for the hearing. The defense did not respond until a week later when the Government again attempted to set the date and the defense agreed to a date.¹³⁵ The court held that “defense counsel’s failure to respond immediately to Government counsel’s notification” that the Government was ready to proceed was not delay “at the request or with the consent of the defense.”¹³⁶

In *United States v. Burris*,¹³⁷ the Court of Military Appeals considered a similar informal exchange of communications between counsel in docketing a case. In ruling for the defense, the court stated the rule that “docketing delays are generally attributable to the Government.”¹³⁸ Contrary to the views of the White court on the gentlemanly scheduling of cases, the court also stated:

We believe that many of the problems involved in attributing pretrial delays will be ameliorated if **all** such requests for delay, together with the reasons therefore, were acted upon by the convening authority prior to referral of charges to a court-martial, or by the trial judge after such referral, rather than for them to be the subject of negotiation and agreement between opposing counsel. This procedural requirement will establish as a matter of record who requested what delay and for what reason.¹³⁹

Several important points can be drawn from the language of R.C.M. 707(c)(3) and the cases construing this provision. Note the

¹³²*Id.* at 634 n.5.

¹³³*Id.*

¹³⁴22 M.J. 759 (N.M.C.M.R. 1986).

¹³⁵*Id.* at 760, 761.

¹³⁶*Id.* at 761.

¹³⁷21 M.J. 140 (C.M.A. 1985).

¹³⁸*Id.* at 144.

¹³⁹*Id.* at 145.

language of the rule taken directly from the ABA Standard,¹⁴⁰ delay from "a Continuance . . . granted" at the request or with the consent of the defense.¹⁴¹ R.C.M. 707(c)(3) adds the additional phrase "delay in a proceeding." It is unclear if "delay in a proceeding" must be "granted" or if the word "granted" relates only to the granting of a continuance. The language of the ABA Standard likely contemplates the formal granting of a continuance by the court. The meaning of R.C.M. 707(c)(3), however, is unclear and only the White court has come close to even adverting to the issue in their mention of the requirement for a "proceeding."¹⁴²

At least arguably, R.C.M. 707(c)(3) is not a broad exclusion for "defense delay," but a narrow exclusion for delay in a proceeding, such as an Article 32 investigation, granted by the investigating officer, or a continuance in a court-martial granted by the judge, at the request or with the consent of the defense. This reading of the exclusion reinforces the approach suggested by the Court of Military Appeals in *Burris*.¹⁴³ The dangers of the informal scheduling of cases, supported by the Navy-Marine Court in *White*, and the delayed docketing of cases, is well illustrated by *Harris*,¹⁴⁴ *White*,¹⁴⁵ *Butterbaugh*,¹⁴⁶ and *Burris*.¹⁴⁷ The only prudent course for the Government is precisely the approach rejected in *White*. When the Government is ready to proceed, and a mutually agreeable date for a pretrial proceeding or trial cannot quickly be set well within the limits of the speedy trial rule, the Government should set the case with the investigating officer or the judge. If the defense then desires a delay, a clear record can be made that delay was "granted at the request or with the consent of the defense." Considering the remedy of dismissal with prejudice for failure to timely bring an accused to trial, any other approach by the Government is negligent.

D. EXCLUSION (c)(4) FOR FAILURE OF THE DEFENSE TO TAKE ACTION REQUIRED BY THE MANUAL

R.C.M. 707(c)(4) excludes from the speedy trial period "delay

¹⁴⁰Standards for Criminal Justice § 12-2.3(c) (1978).

¹⁴¹R.C.M. 707(c)(3).

¹⁴²22 M.J. at 634.

¹⁴³21 M.J. 140 (C.M.A.1985).

¹⁴⁴20 M.J. 795 (N.M.C.M.R.1985).

¹⁴⁵22 M.J. 631 (N.M.C.M.R.1986).

¹⁴⁶22 M.J. 759 (N.M.C.M.R. 1986).

¹⁴⁷21 M.J. 140 (C.M.A.1985).

resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual.” The analysis to the rule notes that this exclusion is added to the exclusions of the ABA Standards, but states it is implicit in the ABA Standard’s exclusion for “other proceedings” or for a defense requested continuance.¹⁴⁸ No further explanation of the exclusion is offered.

Examples of the possible application of exclusion (c)(4) would be when the defense fails to provide notice of the defense of lack of mental responsibility or alibi, as required by the Manual.¹⁴⁹ This policy choice to charge the defense with delay resulting from defense failure to follow the procedural rules of the Manual seems sound. No cases have yet construed this exclusion.

E. EXCLUSION (c)(5) FOR DELAY AT THE REQUEST OF THE PROSECUTION UNDER CERTAIN CIRCUMSTANCES

R.C.M. 707(c)(5) provides for exclusion of “delay in the Article 32 hearing or a continuance in the court-martial at the request of the prosecution if”

(A) The delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the prosecution’s case when the Government has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time; or

(B) The continuance is granted to allow the trial counsel additional time to prepare the prosecution’s case and additional time is justified because of the exceptional circumstances of the case.

The (c)(5) exclusion generally tracks the exclusion of ABA Standard 12-2.3(d).¹⁵⁰

United States *v. Kuelker*¹⁵¹ is the only case to construe the (c)(5) exclusion. In this case, 160 days passed from notice of preferral to trial.¹⁵² The Government argued at trial and on appeal

¹⁴⁸“R.C.M. 707 analysis.

¹⁴⁹R.C.M. 701(b).

¹⁵⁰Standards for Criminal Justice § 12-2.3(d) (1978).

¹⁵¹20 M.J. 715 (N.M.C.M.R.1985).

¹⁵²*Id.* at 716.

that it was delayed in the prosecution of the case by the need to get allegedly forged United States Treasury checks from the Treasury Department for use as evidence.¹⁵³ Five days after preferral of charges, the trial counsel subpoenaed the Treasury Department for the checks, but they were not received until almost three months later.¹⁵⁴ Prior to trial, however, the Government never requested a delay or a continuance; it simply argued the (c)(5) exclusion at trial after the delay had passed.¹⁵⁵ Given these facts, the Navy-Marine Court ruled against the Government, finding "no indication that the Government attempted to invoke the relevant mechanism in R.C.M. 705(c)(5) to gain a continuance excluded from the 120-day **limit**."¹⁵⁶ A prerequisite, then, for an exclusion under (c)(5) is that the Government "invoke the relevant mechanism" by requesting and being granted a delay or a continuance prior to trial.

F. EXCLUSION (c)(6) FOR THE ABSENCE OF THE ACCUSED

"Any period of delay resulting from the absence or unavailability of the accused" is excluded from the speedy trial period under R.C.M. 707(c)(6). The parallel ABA Standard also provides for an exclusion for the absence or unavailability of the defendant, but goes further and defines when a defendant is considered absent or unavailable.¹⁵⁷ The Federal Speedy Trial Act is similar to the ABA Standard, but broadens the exclusion to include the absence or unavailability of "an essential **witness**."¹⁵⁸

Two cases, both from the Navy-Marine Court of Military Review, have addressed exclusion (c)(6). The court's more comprehensive consideration came in *United States v. Lilly*.¹⁵⁹ Marine Private Lilly left his unit in Hawaii without authority while charges that had been brought against him were pending **trial**.¹⁶⁰ He subsequently was arrested in Nevada and turned over to military authorities there. Lilly again left military control without authority while in Nevada, and was again arrested. He was returned to Hawaii and put in pretrial confinement, but escaped.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 715.

¹⁵⁵ *Id.* at 716-17.

¹⁵⁶ *Id.* at 717.

¹⁵⁷ "Standards for Criminal Justice § 12-2.3(e) (1978).

¹⁵⁸ 18 U.S.C. §§ 3161(h)(3)(A) and (B) (1982).

¹⁵⁹ 22 M.J. 620 (N.M.C.M.R.1986).

¹⁶⁰ *Id.* at 621.

He was apprehended later the same day, and ultimately brought to trial.¹⁶¹

In reviewing the exclusion of R.C.M. 707(c)(6), the court in *LIZzy* considered whether the exclusion only included periods of actual absence from military control, or whether a longer period was contemplated.¹⁶² From the “plain language of exclusion (6)” the court concluded:

We hold that exclusion (6) contemplates the period of actual absence *plus* the time it takes to return the accused to his command, or the command to which reassigned, *plus* the time it takes to join or rejoin him to the command and process the original charges back to trial. The latter two factors are subject to the general limitations of government diligence and undue prejudice to the accused.¹⁶³

This conclusion of the *LIZzy* court seems partially right. The language of R.C.M. 707(c)(6) provides for exclusion of “[a]ny period of delay resulting from the absence or unavailability of the accused.” As the court correctly notes, clearly this includes the period of actual absence of a service member from military control. The language is broader, however, and also includes “[a]ny period of delay *resulting*” from the absence of the service member. Thus, to the extent the time it takes to return the service member to his or her unit “results from the absence” of the member and not from a lack of reasonable diligence on the part of the Government, this period of travel is also excluded. The precise meaning of the court’s language “plus the time it takes to join or rejoin him to the command” is unclear. The phrase likely addresses the time after travel to the general location of a ship until a sailor or marine can be put back aboard the ship.

The court’s additional phrase “plus the time it takes to . . . process the original charges back to trial,”¹⁶⁴ seems to go too far. The proper focus should be whether the delay resulted from the service member’s absence. This is the apparent meaning of the court’s language “subject to the general limitation[] of government **diligence**.”¹⁶⁵ If the Government is not reasonably diligent, the delay results from the Government’s lack of diligence, not

¹⁶¹*Id.* at 621-22.

¹⁶²*Id.* at 624.

¹⁶³*Id.* at 625 (emphasis added).

¹⁶⁴*Id.*

¹⁶⁵*Id.*

from the service member's absence. The concluding phrase concerning "undue prejudice to the accused"¹⁶⁶ is a misstatement by the court. Prejudice to the accused is not a factor in determining whether a period of delay resulted from the absence of an accused.

Another panel of the Navy-Marine Court applied R.C.M. 707(c)(6) and *Lilly* in *United States v. Turk*.¹⁶⁷ Turk involved a sailor who left port in Florida without authority and missed the sailing of his ship. After an unauthorized absence of 142 days, Turk surrendered at the Florida port.¹⁶⁸ The speedy trial period in the case began when Turk was placed under pretrial restraint upon his surrender. By this time, Turk's ship was deployed in the Indian Ocean and it was not until twenty-four days later that he rejoined the ship, then in Bahrain in the Middle East.¹⁶⁹

On these facts, the court concluded that "the 24 day period involved in transporting [Turk] . . . from the place where he terminated his absence to his unit is properly accountable to him under R.C.M. 707(c)(6). This is so because the commanding officer of his ship was the proper official to make the initial disposition of [Turk's] . . . alleged offenses."¹⁷⁰ The court added, however, that the Government must act "reasonably and without improper purpose."¹⁷¹

The Turk analysis appears to be correct. Turk's actual period of absence, plus the time reasonably necessary to travel to and rejoin him to his ship would be "delay resulting from the absence or unavailability of the accused."¹⁷²

G. EXCLUSION (c)(7) FOR JOINT TRIALS

R.C.M. 707(c)(7) provides that any "reasonable period of delay" for a joint trial will be excluded when the speedy trial period for the coaccused has not run and "there is good cause for not granting a severance." The ABA Standards and the Federal Speedy Trial Act contain similar provisions.¹⁷³ Joint trials in the military are rare, however, and no reported decision has yet construed exclusion (c)(7).

¹⁶⁶*Id.*

¹⁶⁷22 M.J. 740 (N.M.C.M.R.) *petition granted*, 23 M.J. 156 (C.M.A. 1986).

¹⁶⁸*Id.* at 741.

¹⁶⁹*Id.*

¹⁷⁰*Id.* at 741-42.

¹⁷¹*Id.*

¹⁷²R.C.M. 707(c)(6).

¹⁷³Standards for Criminal Justice § 12-2.3(g) (1978); 18 U.S.C. § 3161(h)(7) (1982).

Only exclusion (c)(7) explicitly requires that the "period of delay" be "reasonable." To carry out the purpose of the speedy trial rule, however, a court could read a requirement of reasonableness into other exclusions, for instance, when the Government takes an unreasonably long period of time to complete a mental examination of an accused. A court might find that "[a]ny period of delay resulting from" a mental examination¹⁷⁴ does not include unreasonable delay from a lack of diligence on the part of the Government. The unreasonable delay does not "result[] from" the examination, but from Government delay.

H. EXCLUSION (c)(8) FOR "GOOD CAUSE"

"Any period of delay for good cause, including unusual operational requirements and military exigencies" is excluded from the speedy trial period under R.C.M. 707(c)(8). Because of the flexibility available in interpreting what constitutes "good cause," (c)(8) is potentially the most important exclusion. No definition of "good cause" is provided in the rule, or in the discussion or analysis.

The ABA Standards provide a parallel exclusion for "other periods of delay for good cause."¹⁷⁵ The commentary to the ABA Standard states that "insofar as is possible" "it is desirable that the basic policy question[s] involved in determining which periods of delay before trial are necessary" should be resolved in the specific exclusions.¹⁷⁶ The specific exclusions address "the commonly recurring policy questions."¹⁷⁷ The exclusion for "good cause" is available, the commentary states, when "a unique situation" arises, and provides "a residual discretionary power . . . to deal with such a situation."¹⁷⁸ The commentary further notes¹⁷⁹ that the standard differs from the related provision of the Uniform Rules of Criminal Procedure which provides a residual exclusion for "exceptional circumstances."¹⁸⁰

1. Cases Construing "Good Cause."

The first case to address the "good cause" exclusion of R.C.M. 707(c)(8) was *United States v. Kuelker*.¹⁸¹ In *Kuelker*, the Govern-

¹⁷⁴R.C.M. 707(c)(1)(A).

¹⁷⁵Standards for Criminal Justice § 12-2.3(h) (1978).

¹⁷⁶Id. commentary at 34.

¹⁷⁷Id.

¹⁷⁸Id.

¹⁷⁹Id.

¹⁸⁰Uniform Rules of Criminal Procedure § 722(f)(11) (1974).

¹⁸¹20 M.J. 715 (N.M.C.M.R. 1985).

ment argued that it was delayed for "good cause" when approximately three months passed from the time the prosecution subpoenaed the United States Treasury Department for allegedly forged Treasury checks needed in the case, until the checks were received.¹⁸² The Navy-Marine Court of Review, however, gave a very narrow reading to the "good cause" exclusion, and rejected the Government's argument. The court stated that the "nature of the 'delay for good cause' " in the rule "is well-defined by the illustrations provided therein, i.e., ' "unusual" operational requirements and military exigencies' , . . . The plain meaning of these terms is an extraordinary situation, rather than the normal difficulties encountered by the Government in preparing for trial. A lesser standard could allow the exception to devour the rule."¹⁸³

The Kuelker requirement of an "extraordinary situation" was applied by the Navy-Marine Court in *United States v. Harris*.¹⁸⁴ In *Harris*, pretrial negotiations over a plea argument were complicated and delayed because the convening authority was deployed aboard ship.¹⁸⁵ Communication with the convening authority by telephone and naval message was necessary. The court concluded, however, that there was no evidence to indicate that the deployment of the convening authority was "unusual" and thus, "good cause" for delay was not established.¹⁸⁶

The Army Court of Review gave a broader reading to "good cause" in *United States v. Durr*.¹⁸⁷ In *Durr*, the Army Court stated that "unusual operational requirements and military exigencies are listed as illustrative of good cause," but noted that the related ABA Standard had rejected the "more onerous 'exceptional circumstances' standard" of the Uniform Rules of Criminal Procedure.¹⁸⁸ The court continued, however, that "while less may be needed to satisfy the good cause requirement than extraordinary circumstances, the overriding concern that an accused receives a speedy trial imposes limitations on the breadth of the good cause **standard**."¹⁸⁹ To determine "good cause," the court suggested a methodology adapted from an exclusion in the Federal Speedy Trial Act.

¹⁸²*Id.* at 715-16.

¹⁸³*Id.* at 716.

¹⁸⁴20 M.J. 795 (N.M.C.M.R. 1985).

¹⁸⁵*Id.* at 796.

¹⁸⁶*Id.* at 797.

¹⁸⁷21 M.J. 576 (A.C.M.R. 1985).

¹⁸⁸*Id.* at 578.

¹⁸⁹*Id.*

Among its provisions, the Speedy Trial Act includes an exclusion for:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the *ends of justice* served by taking such action *outweigh* the *best interest* of the *public and the defendant in a speedy trial*.¹⁹⁰

From this the Army Court concluded, "We believe the standard of good cause contemplates a balancing test. The interest of the accused and the military in a speedy trial must be weighed against the ends of justice that may be served by a delay in trial."¹⁹¹ Thus, under *Durr*, if the ends of justice served by a delay outweigh the interest of the accused and the military in a speedy trial, "good cause" to exclude the delay from the speedy trial period exists.

In *United States v. Lilly*,¹⁹² the Navy-Marine Court of Review "embrace[d]" the reasoning of the Army Court in *Durr* for determining "good cause" and suggested that in *Kuelker* and *Harris* there was "apparent, though not actual, confusion of the concept of good cause with those of operational requirements and military **exigencies**."¹⁹³ The court concluded that the good cause exclusion is a "rule of balance, common sense, and reason to be realistically applied in its military **setting**."¹⁹⁴

2. "Good Cause" and Joinder of Additional Charges

The *Durr* and *Lilly* courts grappled with the meaning of "good cause" in cases in which additional charges were brought against an accused based on new misconduct, while the original charges were pending trial. Unlike the typical civilian rule, the general policy in military justice practice ordinarily is to try **all known** charges together in a single court-martial.¹⁹⁵ Clearly there can be

¹⁹⁰18 U.S.C. § 3161(h)(8)(A) (1982) (emphasis added).

¹⁹¹21 M.J. at 578.

¹⁹²22 M.J. 620 (N.M.C.M.R.1986).

¹⁹³*Id.* at 625.

¹⁹⁴*Id.* at 626.

¹⁹⁵R.C.M. 601(e)(2) ("In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial"); R.C.M. 601(e)(2) discussion ("Ordinarily all known charges should be referred to a single court-martial"); R.C.M. 906(b)(10) (motion for severance of offenses may be granted "only to prevent manifest injustice"); R.C.M. 906(b)(10) discussion ("Ordinarily, all known charges should be tried at a single court-martial").

tension between this joinder policy and speedy trial requirements. The *Durr* court briefly considered this issue and concluded that “the commission of additional offenses may justify a delay in trial” and satisfy the “good cause” requirement.¹⁹⁶ The court stated, however, that additional charges are “not *per se* justifications” for delay.¹⁹⁷ On the facts of *Durr*, the court found no evidence the additional charges delayed the Government.¹⁹⁸

In *LIZZY*, the Navy-Marine Court noted the tension between the joinder interest and the speedy trial interest and suggested that the balancing test for “good cause” under *Durr* could be used to weigh the interests.¹⁹⁹ On the facts of *LIZZY*, which involved a series of unauthorized absences and related offenses, the court stated that the “joinder of offenses policy [should] be liberally construed in favor of allowing the government a reasonable time to join original and subsequent offenses in instances of unauthorized absence which occur prior to trial on original charges.”²⁰⁰ The court cautioned, “Such prosecutions should not, however, occur under circumstances unduly prejudicial to the accused.”²⁰¹ In summary, the court concluded an extensive balancing analysis was appropriate:

We are compelled to the conclusion that the balancing steps set forth generally in *United States v. Durr, supra*, need to be tailored to the context of the specific exclusion problem in order to weigh the interest of both government and accused. Thus, in determining whether a prosecution of a subsequent unauthorized absence (and any related offense) is an event which justifies the delay for good cause as well as the reasonableness of the delay credited to it, we hold that the following factors are significant and must be considered.

- a. The gravity and complexities of the original offenses.
- b. The length of the absence, the circumstances surrounding its inception and termination and the complexities of proof.
- c. The time and complexities involved in returning and joining the accused to his original command or obtaining

¹⁹⁶21 M.J. at 578.

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 578-79.

¹⁹⁹22 M.J. at 628.

²⁰⁰*Id.* at 627.

²⁰¹*Id.* at 628.

necessary records and documents by any new command to which the accused might be joined and whether or not the government was reasonably diligent in accomplishing these tasks.

d. The time, procedures, and complexities involved in accomplishing the joinder of offenses by which the government seeks to further its goal of efficient and effective law enforcement and the extent to which that policy is served by the joinder.

e. The actual delay in the trial on the original charges caused by the joinder of the subsequent offense. This factor includes both nexus and time.

f. The right of the appellant to be tried within 120 days of a triggering event, delayed only by good cause.

g. Prejudice to the accused, including but not limited to his restraint status on both sets of offenses, access to the witnesses and evidence pertaining to the original offense, and whether the delay occasioned by the joinder is relatively slight or significant in relation to other items of prejudice, and any other factors indicating prejudice to the accused.

h. The existence of any bad faith, *i.e.* joining the subsequent offense only to gain time and then dropping them [sic] just before trial.

i. Whether there has been any demand for speedy trial, including conduct of the accused or counsel manifesting a desire to have or to avoid a speedy trial. The demand for speedy trial and other relevant conduct are significant measures of the intensity of an accused's desire, and, hence, his interest in, a speedy trial.

After weighing the foregoing factors, the military judge may, in the exercise of judicial discretion, determine that **all**, some, or none of the time in question, beyond the actual period excludable under R.C.M. 707(c)(6) as resulting from that absence, is excludable under **R.C.M. 707(c)(8)—good** cause—because of the convening authority's decision to join original and additional charges.²⁰²

²⁰²*Id.* at 628-29 (footnotes omitted).

In *United States v. Britton*,²⁰³ the Air Force Court of Review did not consider the possibility that additional charges could constitute "good cause" for a delay and stated that the "speedy trial rule of R.C.M. 707 calls for some careful rethinking of old military justice practices such as ordinarily trying all known offenses at the same time. This is no longer suggested by the Manual and . . . can be **risky**."²⁰⁴

3. "Good Cause"—Conclusions

From the language of exclusion (c)(8), the commentary to the similar ABA Standard, and the widely divergent views of *Kuelker*,²⁰⁵ *Harris*,²⁰⁶ *Durr*,²⁰⁷ *Lilly*,²⁰⁸ and *Britton*²⁰⁹ on what constitutes "good cause," what conclusions can be drawn? The language of R.C.M. 707(c)(8), "delay for good cause, including unusual operational requirements and military exigencies" is of only limited help. From this language, if an operational requirement is to be "good cause" for delay, it must be unusual. Military exigencies also constitute "good cause" for delay, but here it is less clear that the exigency, or pressing need for military action, must be unusual. Depending on the circumstances of a military organization, military exigencies could be unusual or could be usual. In any event, as *Durr* correctly **notes**,²¹⁰ the fact that "good cause" includes "unusual operational requirements and military exigencies" does not exhaust its meaning.

The commentary²¹¹ to the related ABA Standard is helpful, but inconclusive. *Durr* is correct in concluding the related ABA Standard requires less than "exceptional" or "extraordinary" circumstances for "good cause."²¹² As *Lilly* recognizes, *Kuelker* and *Harris* are wrong in requiring an "extraordinary situation."²¹³ The commentary makes clear, however, that "good cause" is a "residual" exclusion for issues unforeseen and unaddressed in the specific exclusions, which address "commonly recurring policy questions."²¹⁴ This language of the commentary would appear to counsel that as cases recognize recurring policy questions, such as

²⁰³22 M.J. 501 (A.F.C.M.R.1986).

²⁰⁴*Id.* at 502.

²⁰⁵20 M.J. 715 (N.M.C.M.R.1985).

²⁰⁶20 M.J. 795 (N.M.C.M.R.1985).

²⁰⁷21 M.J. 576 (A.C.M.R.1985).

²⁰⁸22 M.J. 620 (N.M.C.M.R.1986).

²⁰⁹22 M.J. 501 (A.F.C.M.R.1986).

²¹⁰21 M.J. at 578.

²¹¹Standards for Criminal Justice § 12-2.3(h) commentary at 34 (1978).

²¹²21 M.J. at 578.

²¹³22 M.J. at 625.

²¹⁴Standards for Criminal Justice § 12-2.3(h) commentary at 34 (1978).

the joinder of additional charges issue, those issues should be addressed in the specific exclusions. If they are not, a court could more easily find “good cause” is lacking. The commentary also states that the “good cause” exclusion addresses a “unique situation” that “will occasionally arise.”²¹⁵ To what extent a truly unique circumstance is required, or simply a circumstance not addressed in the specific exclusions, is unclear.

The approach of the Army Court of Military Review in *Durr*, adapted from a provision of the Federal Speedy Trial Act, offers a useful middle ground. Under *Durr*, the task of the trial judge is to fairly balance the interests of the accused and the military in a speedy trial against other “ends of justice that may be served by a delay in trial.”²¹⁶ This is a difficult task for the trial judge, but a necessary one. The judge’s balancing analysis should recognize the given policy choice of R.C.M. 707 that, normally, an accused should be brought to trial within 120 days, plus any delay for time periods within the specific exclusions. Beyond this time, it is possible that an additional period of time might be permitted under a “residual,” or lesser, exclusion for “good cause.”

The danger in this “good cause” analysis lies in the extreme tension between the view, on the one hand, that the Government certainly should be able to bring an accused to trial within the speedy trial period and, on the other hand, the extremely harsh remedy of dismissal of charges with prejudice. The dismissal remedy itself guts the interest of justice in an accurate outcome on the merits, without regard to any prejudice to the accused or even a desire for a speedy trial.

The analysis in *Lizzy*, while generally adopting the balancing approach of *Durr*, loses the balance in its multiplication of factors to be considered, including prejudice to the accused and any demand for a speedy trial.²¹⁷ This broad analysis provides flexibility to avoid the harsh remedy of dismissal when prejudice or demand for trial is lacking, but in doing so, overcomes the general policy choice of the speedy trial rule.

4. Resolving Exclusions Before Time Has Run

While not solving the harshness of the dismissal remedy, the *Lilly* court noted that the Government need not guess whether a period may be excluded for “good cause,” or for that matter

²¹⁵ *Id.*

²¹⁶ 21 M.J. at 578.

²¹⁷ 22 M.J. at 628-29.

under another exclusion, until the 120 day period has passed: "We note that the practical effect of our analysis ... is to drive the government to the military judge, via a motion for appropriate relief prior to trial, during the hearing of which the analytical factors can be presented and considered before the 120 days **expire**."²¹⁸ After referral of charges, the Government should raise the issue of a potential exclusion before the trial judge and have any disputed time resolved prior to the end of the speedy trial period. If the judge rules against the Government, the prosecutor can move the case forward accordingly. This is essentially the approach required by the Federal Speedy Trial Act in the provision relied on in *Durr* for the balancing analysis. In the Act, the exclusion depends on the judge granting a continuance in the case after balancing the interests involved and finding the delay appropriate.²¹⁹

VII. NEXUS BETWEEN THE EVENT WHICH AUTHORIZES AN EXCLUSION AND A DELAY IN TRIAL

In determining whether an exclusion of R.C.M. 707(c) applies to permit the subtraction of a period of time from the Government accountable speedy trial period, the question arises whether a nexus is required between an event that authorizes an exclusion and any delay in trial. The answer, from the straightforward language of the exclusions of R.C.M. 707(c), is that a nexus is required. This should be clear from the language of R.C.M. 707(c) that "The following periods shall be excluded ..." followed by the phrase "[a]ny period of delay resulting from"²²⁰ the stated event, such as a mental examination. The Army Court of Review reached this conclusion in *Durr*,²²¹ stating that it is necessary to determine "whether a nexus exists between the event [that authorizes an exclusion] and any delay in trial."²²²

A panel of the Navy-Marine Court of Military Review incorrectly reached a contrary result in *United States v. Jones*.²²³ In the pretrial processing of the *Jones* case, approximately five weeks passed after the initial appointment of an Article 32

²¹⁸*Id.* at 629 n.6.

²¹⁹18 U.S.C. § 3161(h)(8)(A) (1982).

²²⁰All the exclusions of R.C.M. 707(c) begin with the phrase "Any period of delay resulting from" the stated event, or a similar phrase.

²²¹21 M.J. 576 (A.C.M.R.1985).

²²²*Id.* at 578.

²²³21 M.J. 819 (N.M.C.M.R.1985).

investigating officer until a second investigating officer was appointed because the first retired.²²⁴ During this five-week period the accused underwent a mental examination that consumed six days from the day of evaluation until trial counsel received the psychiatric report.²²⁵ From the initial imposition of restraint in the case to trial, there were 126 days of Government-accountable time, unless the time for the mental examination could be excluded.²²⁶ The trial judge found there was no evidence the psychiatric evaluation delayed the trial.²²⁷ The clear inference from the chronology in the case is that any delay resulted from the need to appoint a new investigating officer. The Navy-Marine Court of Review, however, reversed the trial judge, stating, "It is immaterial that the mental examination was not shown to have actually delayed trial."²²⁸ This statement from the *Jones* court, however, overlooks the requirement of R.C.M. 707(c) that there be "delay resulting from" the event that authorizes an exclusion of time from the speedy trial period. In *United States v. Lilly*,²²⁹ another panel of the Navy-Marine Court of Review seems to quote both *Durr's* nexus language and *Jones* with approval,²³⁰ without resolving the inconsistency.

VIII. THE 90 DAY PROVISION FOR ARREST OR CONFINEMENT

While the general rule of R.C.M. 707(a) requires that an accused be brought to trial within 120 days, a special rule in R.C.M. 707(d) applies if the accused is in pretrial arrest or confinement:

When the accused is in pretrial arrest or confinement under R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. No accused shall be held in pretrial arrest or confinement in excess of 90 days for the same or related charges. Except for any periods under subsection (c)(7) of this rule, the periods described in subsection (c) of this rule shall be excluded for the purpose of computing when 90 days has run. The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.²³¹

²²⁴*Id.* at 820.

²²⁵*Id.*

²²⁶*Id.* at 821.

²²⁷*Id.*

²²⁸*Id.* at 822.

²²⁹22 M.J. 620 (N.M.C.M.R.1986).

²³⁰*Id.* at 624, 626.

²³¹R.C.M. 707(d).

Thus, when an accused is in pretrial arrest or confinement "immediate steps" shall be taken to bring the accused to trial. The discussion to the rule states that "[o]rdinarily priority should be given to trial of persons in arrest or **confinement**."²³²

Except for the exclusion under R.C.M. 707(c)(7) for joint trials, **all** the exclusions in R.C.M. 707(c), discussed above, are also excluded from this ninety day period. After subtracting any exclusion, the rule simply states, "**No** accused shall be held in pretrial arrest or confinement, in excess of 90 days for the same or related **charges**."²³³ The military judge may extend the period by ten days, however, upon a showing of "extraordinary circumstances."²³⁴

IX. REVIEW AND CRITIQUE OF THE NINETY DAY PROVISION

A. ARTICLE 10 AND THE BURTON RULES

R.C.M. 707(d) is **based**,²³⁵ in part, on Article 10 of the Uniform Code of Military Justice, which provides, "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release **him**."²³⁶

The discussion and analysis of R.C.M. 707(d) note the existing case law rules developed from Article 10 by the Court of Military Appeals in the seminal case of *United States v. Burton*.²³⁷ In *Burton*, decided in 1971, the Court of Military Appeals held:

For offenses occurring after the date of this opinion . . . in the absence of defense requests for continuance, a presumption of an Article 10 violation will exist when pretrial confinement exceeds three months. In such cases, this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed.

Similarly, when the defense requests a speedy disposition of the charges, the Government must respond to the

²³²R.C.M. 707(d) discussion.

²³³R.C.M. 707(d).

²³⁴*Id.*

²³⁵R.C.M. 707(d) analysis.

²³⁶UCMJ art. 10.

²³⁷21 C.M.A. 112, 44 C.M.R. 166 (1971).

request and either proceed immediately or show adequate cause for any further delay. A failure to respond to a request for a prompt trial or to order such a trial may justify extraordinary relief.²³⁸

With subsequent judicial interpretation and refinement, the existing *Burton* rules can be summarized in two prongs. The first prong is the *Burton* ninety-day rule: If an accused is in pretrial arrest or confinement for more than ninety days,²³⁹ a presumption arises of a denial of speedy trial and charges must be dismissed with prejudice unless the Government can show extraordinary circumstances to rebut the presumption. The *Burton* ninety day rule generally has been applied strictly, and “extraordinary circumstances” to rebut the presumption narrowly construed.²⁴⁰ Periods of time that may be excluded from the *Burton* ninety day period have been strictly limited, largely to defense requested delay²⁴¹ and time for psychiatric evaluation of an accused.²⁴²

The second prong of *Burton* is the *Burton* “demand rule”: If the defense demands a speedy trial, the Government must proceed immediately or show adequate cause for any further delay.²⁴³ While some authority held that reassessment of an accused’s sentence was an adequate remedy for violation of the *Burton* demand rule,²⁴⁴ it is now clear that dismissal with prejudice is the required remedy.²⁴⁵

R.C.M. 707 and 707(d) are, in part, a response to a perception that the *Burton* rules have been applied too harshly against the

²³⁸44 C.M.R. at 172.

²³⁹*United States v. Driver*, 49 C.M.R. 376 (1974) (*Burton* three-month period refined to 90 days).

“*United States v. Henderson*, 1 M.J. 421 (C.M.A. 1976) (conviction for murder reversed and charge dismissed where Government failed to show how seriousness of offense and foreign location justified 132 days of pretrial confinement). But see *United States v. Groshong*, 14 M.J. 186 (C.M.A. 1982) (104 days of pretrial confinement until trial justified by “repeated misconduct” of the accused “beyond the control of the prosecution” resulting in additional investigation and charges); *United States v. Cole*, 3 M.J. 220 (C.M.A. 1977) (complexity of case justified 100 days of pretrial confinement).

“*United States v. Cherok*, 22 M.J. 438 (C.M.A. 1986); *United States v. Rogers*, 17 M.J. 990 (A.C.M.R. 1984).

“*United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983); *United States v. McDowell*, 19 M.J. 937 (A.C.M.R. 1985).

“*United States v. Rowsey*, 14 M.J. 151 (C.M.A. 1982).

“*United States v. Herrington*, 2 M.J. 807 (A.C.M.R.), *petition denied*, 5 M.J. 1109 (C.M.A. 1976).

²⁴⁰*United States v. Rowsey*, 14 M.J. 151 (C.M.A. 1982). (“For denial of the right to speedy trial, only dismissal is compensatory. We cannot agree that sentence reassessment can adequately compensate an appellant and deter future government indifference.”).

Government. The analysis to R.C.M. 707 notes that the ninety day provision of R.C.M. 707(d), along with the 120 day rule, "provides a basis for further reexamination of the *Burton* presumption."²⁴⁶

B. THE RELATED ABA STANDARD

In addition to being based on Article 10 of the Uniform Code of Military Justice, the Manual analysis states that R.C.M. 707(d) is also based on ABA Standard 12-4.2 and a similar provision of the Federal Speedy Trial Act.²⁴⁷ ABA Standard 12-4.2 states: "If a shorter time limitation is applicable to defendants held in custody, the running of this time should only require release of such a defendant on his or her own **recognizance**."²⁴⁸ The commentary emphasizes that the remedy under the Standard is release from custody, not dismissal: "[T]he shorter time limitations for those in custody . . . serve only to terminate custody and thereby put the defendant who is in custody in approximately the same position as other **defendants**."²⁴⁹ The related Speedy Trial Act provision also apparently contemplates release from custody when the specified time limit is reached.²⁵⁰ Thus, the language of R.C.M. 707(d), "no accused **shall** be held in pretrial arrest or confinement in excess of 90 days," may simply mean that release from arrest or confinement is required after ninety days. After release the accused is protected, as are other accused service members, by the general 120 day speedy trial rule of R.C.M. 707(a).

C. THE ANALYSIS TO R.C.M. 707(d)

The discussion and analysis to R.C.M. 707(d) do not explicitly clarify whether the ninety day rule of R.C.M. 707(d) requires dismissal as a remedy, or merely release from pretrial arrest or custody. Two phrases from the Manual analysis, however, indicate the intent of the drafters of R.C.M. 707(d) was to adopt the approach of the ABA Standard and require release after 90 days, not dismissal. In discussing the *Burton* ninety day presumption, with its remedy of dismissal, the analysis to R.C.M. 707(d) states, "The application of subsection (d) should preclude triggering the

²⁴⁶R.C.M. 707(d) analysis.

²⁴⁷*Id.*

²⁴⁸Standards for Criminal Justice § 12-4.2 (1978).

²⁴⁹*Id.* commentary at 46-47.

²⁵⁰18 U.S.C. § 3164 (1982); *United States v. Krohn*, 558 F.2d 390 (8th Cir.), cert. denied, 434 U.S. 868 (1977); *United States v. Leon*, 614 F.Supp. 156 (W.D.N.Y.1985).

90-day presumption [of *Burton*] in most cases.”²⁵¹ The presumption of a denial of speedy trial, and its remedy of dismissal, is avoided by releasing the accused from pretrial arrest or confinement at the ninety day limit. The *Burton* ninety day rule, if not reconsidered by the courts, would not be avoided, however, where the exclusions under R.C.M. 707(c) to the ninety day period of R.C.M. 707(d) are broader than the narrow exclusions currently recognized under *Burton*. This accounts for the phrase in the analysis that under R.C.M. 707(d) the *Burton* presumption would be avoided “in most cases.” The Manual analysis also includes the sentence: “Subsection (d), *together with the speedy trial requirements of this rule* provides a basis for further reexamination of the *Burton* presumption.”²⁵² This sentence seems to imply that the general 120 day rule sets “the speedy trial requirements” of R.C.M. 707, and that R.C.M. 707(d) plays a subsidiary role. This subsidiary role is likely the approach of ABA Standard 12-4.2: release—not dismissal—is contemplated. R.C.M. 707(d) unfortunately does not make this policy choice clear on its face.

D. CASES ON R.C.M. 707(d)

Given this lack of clarity of the ninety day provision of R.C.M. 707(d), and the experience of military appellate courts in applying the *Burton* rule with its remedy of dismissal with prejudice, it is not surprising that the first cases to apply R.C.M. 707(d) have done so as if the rule essentially codified the *Burton* ninety day rule and its remedy of dismissal.

The first case to apply R.C.M. 707(d) was *United States v. Durr*.²⁵³ In this case, Army Private Durr was held in pretrial arrest or confinement for 114 days before he was brought to trial.²⁵⁴ Since no exclusions applied to reduce the Government’s accountable time below the 90 day limit, the result necessary under R.C.M. 707(e) was clear to the Army Court of Review: “As the government failed . . . to bring appellant to trial within the time period required by R.C.M. 707(d), dismissal of the charges is required.”²⁵⁵ R.C.M. 707(e) is the concluding provision of R.C.M. 707 and states, “Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion by the accused.” The open-ended reference in R.C.M. 707(e) to “this rule”

“R.C.M. 707(d) analysis.

²⁵²*Id.* (emphasis added).

²⁵³21 M.J. 576 (A.C.M.R.1985).

²⁵⁴*Id.* at 577.

²⁵⁵*Id.* at 579 (citing R.C.M. 707(e)).

does little to assist a court toward the likely intended interpretation of R.C.M. 707(d) as a subsidiary rule not requiring dismissal. It may be significant, however, that the phrase is "this rule" rather than "these rules."

The only other case as yet to apply the ninety day provision of R.C.M. 707(d) is *United States v. Boden*.²⁵⁶ In *Boden*, a panel of the Army Court of Review found ninety-four days of pretrial confinement accountable to the Government. With little discussion the court, as in *Durr*, dismissed the charge.²⁵⁷

E. THE LACK OF A MECHANISM UNDER R.C.M. 707(d)

An additional problem with R.C.M. 707(d), beyond its facial ambiguity, is that it lacks any mechanism to make it work. Whose burden is it to raise the issue when an accused is in pretrial arrest or confinement for ninety days? Is the burden on the defense? Does the trial judge have a duty to monitor the length of any pretrial arrest or confinement? Or must the Government release an accused from pretrial arrest or confinement on the ninetieth day if no exclusion applies and the prosecution is not ready for trial? At least, arguably, the burden to raise an issue under R.C.M. 707(d) is properly placed on the defense. If the defense counts ninety days of Government accountable pretrial arrest or confinement, they should seek the immediate release of the accused. After referral of charges to a court, relief should be sought from the trial judge; before referral, from the convening authority. If the Government relies on an exclusion under R.C.M. 707(c) from the ninety day period, whether an exclusion properly applies may be determined by the judge. If the defense does not seek the release of the accused, they could be held to have waived the protection of the ninety day limit of R.C.M. 707(d).²⁵⁸

F. EXTENSION OF THE NINETY DAY PERIOD

The final sentence of R.C.M. 707(d) states, "The military judge may, upon a showing of extraordinary circumstances, extend the

²⁵⁶ 21 M.J. 916 (A.C.M.R. 1986).

²⁵⁷ *Id.* at 917, 919.

²⁵⁸ See generally R.C.M. 905(e) (failure to raise defenses or objections may result in waiver); cf. *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985) (failure to raise issue of illegal conditions of pretrial confinement before the magistrate is strong evidence the conditions were not punitive).

[ninety day] period by **10 days.**"²⁵⁹ Recall, however, that all the exclusions of R.C.M. 707(c) discussed above, except the exclusion for joint trials, are already excluded from the ninety day period of R.C.M. 707(d). Thus, periods of delay under the residual exclusion for "good cause"²⁶⁰ would be properly excluded from the ninety day period. Since any "extraordinary circumstance" that would permit the judge to extend the ninety day period for ten days would likely satisfy the requirements for a "good cause" exclusion, it is difficult to see any need to reach an issue under this extension provision. If "extraordinary circumstances" are present in a case to support extension of the ninety day period, "good cause" is also likely present and the period of delay may be excluded.

IX. THE REMEDY OF DISMISSAL WITH PREJUDICE

The final provision of the 1984 Manual speedy trial rule, R.C.M. 707(e), specifies the remedy: "Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion of the accused." The analysis to the rule states it is based on the ABA Standards and dismissal is with prejudice.²⁶¹ The analysis specifically rejects the approach of the Federal Speedy Trial Act, which permits the judge to **dismiss** charges with or without **prejudice**.²⁶² The Speedy Trial Act counsels the judge to consider the following factors in determining whether to dismiss with or without prejudice: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] ... and on the administration of **justice**."²⁶³ The Act also provides for sanctions against counsel for the defense or the Government under limited circumstances, including up to a \$250 **fine**.²⁶⁴ The Manual analysis notes that dismissal without prejudice "merely creates additional delay in disposing of a **case**."²⁶⁵

X. ARE THE BURTON RULES OBSOLETE?

The *Burton* ninety day rule and the *Burton* demand rule arose from the need perceived by the Court of Military Appeals in 1971

²⁵⁹R.C.M. 707(d).

²⁶⁰R.C.M. 707(c)(8).

²⁶¹"R.C.M. 707(e) analysis.

²⁶²18 U.S.C. §§ 3162(a)(1) and (2)(1982).

²⁶³*Id.*

²⁶⁴*Id.* at § 3162(b).

²⁶⁵R.C.M. 707(d) analysis.

for clearer guidance to insure more timely prosecution of courts-martial. The policy choices made by the President in R.C.M. 707 respond to the same perceived need for specific time limits. With R.C.M. 707 now the law, supplemented by the protection of the sixth amendment, little need remains for the *Burton* rules. A holding recognizing this result, of course, properly must come ~~from~~ the Court of Military Appeals. Given the confusing duplication of rules, with differing nuances of language and focus, when one attempts to apply five speedy trial requirements: the 120 day rule of R.C.M. 707, the ninety day limitation of R.C.M. 707(d), the *Burton* ninety day rule, the *Burton* demand rule, and the fundamental protection of the sixth amendment, one would hope the court will find that R.C.M. 707 supplants the *Burton* rules. A schematic **summary** of these five rules is included as an appendix.

To date, three panels of the Courts of Military Review have addressed the current status of the *Burton* rules and the Court of Military Appeals has briefly addressed the issue in reversing one of these decisions in a memorandum opinion. Concerning the *Burton* ninety day rule, a panel of the Army Court of Military Review in *United States v. McElyea*²⁶⁶ said in footnote dictum, "We consider R.C.M. 707(d) to be an effective substitute for the rule established in *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971). We, thus, choose henceforth to rely on R.C.M. 707(d) and to consider the *Burton* rule **obsolete**."²⁶⁷ In *United States v. Ivester*,²⁶⁸ a panel of the Navy-Marine Court of Military Review stated in needlessly strident language: "There is no need to await a magic pronouncement from the Court of Military Appeals to hold that R.C.M. 707 and the Constitution control the determination of speedy trial issues and that the *Burton* rules are no longer **viable**."²⁶⁹ In the third case, *United States v. Harvey*,²⁷⁰ another panel of the Navy-Marine Court found that R.C.M. 707(d) had not adopted the "demand rule" prong of *Burton*, and thus, the demand rule was no longer the law. The Court of Military Appeals,²⁷¹ however, reversed the decision of the Navy-Marine Court of Military Review. The Court of Military Appeals found no "Presidential intent to overrule *Burton* [in R.C.M. 707]" and

²⁶⁶22 M.J. 863 (A.C.M.R. 1986).

²⁶⁷*Id.* at 864 n.1.

²⁶⁸22 M.J. 933 (N.M.C.M.R.1986).

²⁶⁹*Id.* at 937.

²⁷⁰22 M.J. 904 (N.M.C.M.R. 1986).

²⁷¹"*United States v. Harvey*, 23 M.J. 280 (C.M.A. 1986) (memorandum opinion).

questioned whether the President could “displace a judicial decision predicated on Article 10 of the Uniform Code.”²⁷²

This initial consideration by the Court of Military Appeals may signal the continued viability of *Burton*, or may give way to fuller consideration to come. Particularly as to the *Burton* ninety day rule, the similar ninety day provision of R.C.M. 707(d) should provide sufficient protection of speedy trial interests without a confusing multiplication of rules. As to the *Burton* demand rule, it would seem to be a rare case in which the protections of R.C.M. 707(d) coupled with the 120 day rule of R.C.M. 707 would not provide the necessary protection.²⁷³

XI. CONCLUSION

The 1984 Manual for Courts-Martial speedy trial rule, R.C.M. 707, has presented a new challenge to judge advocates. Staff judge advocates and trial counsel must ensure the requirements of the rule are met. Defense counsel must be prepared to properly assert their client's speedy trial rights. Trial judges and appellate courts must discern and carry out the policy choices made by the rule.

Significant errors have been made in construing the rule to this point. In part, the rule is awkwardly drafted and needs corrections. Beyond the rule's own discussion and analysis, the American Bar Association Standards on speedy trial, and their commentary, offer the most useful guidance to understanding R.C.M. 707.

The greatest difficulty in implementing R.C.M. 707 will be the fundamental tension between two commonly held views concerning speedy trial. In one view, it is believed the Government should reasonably be able to bring an accused to trial within the requirements of the speedy trial rule. If the Government fails in that duty, the remedy of dismissal with prejudice is appropriate to insure the accused's speedy trial rights are enforced and to deter future Government delay. The policy choice of the ABA Standards and R.C.M. 707 essentially implements this view.

²⁷²*Id.*

²⁷³A possible alternative approach to cases that might fall within the demand rule because of unreasonable delay by the Government in processing a case when an accused is in pretrial arrest or confinement would be to find, as a matter of law, that the unnecessarily long restraint evidences an intent to punish and, thus, is illegal under *United States v. Palmiter*, 20 M.J. 590 (C.M.A. 1985). Consistent with *Palmiter* and the accused's interest in release from restraint, the issue should be raised by the defense when any delay becomes unreasonable.

The opposing view is that dismissal with prejudice often destroys the interest of justice in a fair and accurate outcome on the merits of a case and is to be avoided. Absent considerable and unreasonable delay, a desire by the accused for a speedy trial, and prejudice to the accused, no denial of the right to a speedy trial occurs. This view is essentially implemented by the basic protection of the sixth amendment right to a speedy trial.²⁷⁴ This second view is also a reason courts have struggled, and will struggle, to stretch and skew R.C.M. 707 to avoid the remedy of dismissal.

Clearly both these fundamental views are correct, in part. Beyond R.C.M. 707, the challenge for lawyers is to find common ground that fairly and effectively implements the right to a speedy trial and also highly values a fair and accurate outcome on the merits of a case. This middle ground may be better reached through the balancing analysis developed by the Supreme Court under the sixth amendment,²⁷⁵ than under a stricter rule such as R.C.M. 707.

To the extent a speedy trial is desirable, but its denial does not undercut an accurate outcome on the merits of a case through some prejudice to an accused, a remedy short of dismissal with prejudice seems appropriate. Increased scrutiny of unreasonably long pretrial restraint, sentence credit, and vigorous administrative policies requiring a speedy trial are possibilities. There is truth in the axiom, "The remedy should fit the right."

²⁷⁴The landmark case on the sixth amendment right to a speedy trial is *Barker v. Wingo*, 407 U.S. 514 (1972).

The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. . . . A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Id. at 530.

²⁷⁵Id.

APPENDIX
SPEEDY TRIAL RULES SUMMARY

R.C.M. 707

notice of preferral or restraint 707(c) exclusions >120 days ■ dismissal

[_____ / _____ / _____]

R.C.M. 707(d)

arrest or 707(c) exclusions >90 days ■ release 7 dismissal 7
confinement (except joint trial)

[_____ / _____ / _____]

judge may extend 10 days for
"extraordinary circumstances."

Burton 90day rule

PIC or	narrow	>90 days ■ dismissal--unless extraordinary
arrest or	exclusions:	circumstances to rebut presumption:
restriction tantamount	1. defense requested	1. complex offense
to PIC	delay	2. foreign country
	2. psychiatric evaluation	3. matters beyond control of Government

[_____ / _____ / _____]

Burton demandrule

PIC or arrest	demand--proceed immediately or show	dismissal
or restriction	adequate cause for further delay,	
tantamount to PIC	rule not avoided by release	

_____ [_____] _____

(Rowsey, 14 M.J. 151 (C.H.A. 1982) (dismissed; 127 days from preferral to trial; 85 days PTC; 44 days from demand to trial);

(Harvey, 23 M.J. 280 (C.M.A. 1986), rev'g 22 H.J. 904 (N.M.C.M.R.) (dismissed; 79 days PTC; 59 days from demand to trial)]

6th Amendment

preferral or
restraint

balance:	demand, length of delay.	<u>Grom</u> , 21 M.J. 53 (C.M.A. 1985)
	reason for delay, <u>prejudice</u>	(5-6 mos. trigger ■ 150 days)
remedy:	dismissal	

[_____ / _____]

PUBLICATION NOTES

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time by the editor of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. The number of publications received makes formal review of the majority of them impossible. Description of a publication in this section, however, does not preclude a subsequent formal review of that publication in the *Review*.

The comments in these notes are not recommendations either for or against the publications noted. The opinions and conclusions in these notes are those of the preparer of the note. They do not reflect the opinions of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

The publications noted in this section, like the books formally reviewed in the *Military Law Review*, have been added to the library of The Judge Advocate General's School. The School thanks the publishers and authors who have made their books available for this purpose.

Whitebread, Charles H. and Slobogin, Christopher, *Criminal Procedure: An Analysis of Cases and Concepts* (2d ed.). Mineola, New York The Foundation Press, Inc., 1986. Pages: 877. Index, Table of cases, Bibliography. Price: \$26.95. Publisher's Address: The Foundation Press, Inc., 170 Old Country Road, Mineola, New York 11501.

Those of us who grew up with LaFave's Criminal Procedure hornbook on the "easy to reach" shelf of our personal legal libraries will be pleasantly surprised with Whitebread and Slobogin's *Criminal Procedure* (2d ed.). Organized in a basic hornbook-style format, its thirty-four chapters are grouped under eight major headings: the fourth amendment, the fifth amendment, eyewitness identification, entrapment, the pretrial process, adjudication of guilt, the role of the lawyer, and the relationship between the federal and state courts. As might be expected, the heaviest emphasis is on fourth amendment law, but the authors address the full spectrum of criminal procedure issues. Although a few of the chapters will be of limited use to the military practitioner, such as those relating to grand juries and state court deviations from federal standards, on the whole the book is a valuable research tool. Two features are particularly noteworthy:

each chapter ends with a short conclusion that summarizes the black letter principles in the relevant area, and each chapter includes a short bibliography of articles, studies, and books dealing with these issues.

The authors state that they approached their task with three objectives in mind: describing the present state of the law, tracing the historical development of that law, and suggesting a framework for analyzing the various issues. This methodology is highly successful, and lends itself well to the practitioner who wants a general overview of the subject matter. As opposed to other similar research aids, *Criminal Procedure* goes into slightly more detail about the facts of the important cases. Considering the Supreme Court's recent emphasis on the "totality of the circumstances," as opposed to bright-line rules, this technique helps the reader put a case's holding into better tactical perspective. The authors do not just deal with the facts and holdings of various cases, however. They weave the case law into patterns and trends, and discuss the future implications of these trends. As appears to be the fashion these days, the authors are critical of many Supreme Court decisions, and mince few words in their critique of the Court's reasoning. As is not quite so fashionable, however, the authors ground their criticism on persuasive analyses of pre-Warren Court decisions as well as the Warren cases themselves, and underpin these analyses with concise policy considerations. Further, the authors are not overly one-sided in their criticism: they are more than willing to defend the Burger Court when it is attacked without persuasive justification.

Perhaps the best reason to get a copy of *Criminal Procedure*, however, is that it is the most up-to-date reference work of its kind currently available. Criminal procedure is an area of the law that changes rapidly, and a research aid that includes recent case law in its overall framework is a quantum leap better than one only two or three years old. For example, *Criminal Procedure* discusses such important recent cases as *United States v. Inadi*, *Oregon v. Elstad*, *Batson v. Kentucky*, and *Nix v. Whiteside*—cases that appear only in the inevitably disjointed pocket parts of similar works, if at all. Of course, a few years down the road *Criminal Procedure* will be similarly dated, but in the interim it can be a valuable reference tool. In a field where verdicts can turn on an attorney's familiarity and understanding—or lack thereof—of recent case law, \$26.95 is a pretty good price to pay for what *Criminal Procedure* has to offer.

Law and Legal Information Directory. 4th Edition. eds. Steven Wasserman and Jacqueline Wasserman O'Brien. Detroit, **Michigan**: Gale Research **Co.**, 1986. Pages: 813. Price: **\$280.00**. Publisher's address: Gale Research **Co.**, Book Tower, Detroit, **Michigan** 48226.

This new edition of the **Law and Legal Information Directory** includes four new sections: Lawyer Referral Services, Legal Aid Offices, Public Defender Offices, and Legislative Manuals and Registers. The scope of the work covers more than 11,250 entries, arranged in 21 chapters according to type of information **source** or service. In addition to the sections already mentioned, the volume covers:

National and International Organizations

Bar Associations

Examinations and Admission

Federal Court System

Highest State Courts

Federal Regulatory Agencies

Law Schools

Continuing Legal Education

Paralegal Education

Scholarships and Grants

Awards and Prizes

Special Libraries

Information Systems and Services

Research Centers

Legal Periodicals

Book and Media Publishers

Speaker Bureaus

The best attribute of the directory is its comprehensiveness. It compiles entries for which access would otherwise be limited to directories covering specific subject matters. In fact, nine of the twenty-one chapters consist mainly of entries from other Gale directories. In addition, each section is self-indexed in accordance with the requirements of that particular section. Thus, each chapter can be used independently to locate specific types of information sources.

The only reservation with respect to the directory is its rather formidable **price—\$280.00—particularly** as the information will quickly become outdated. Although the data in the volume is current, the rapid rate of change, growth, and adaptation in the legal field means that much of the information will be superseded.

On the other hand, later information should be available from the organizations and publications catalogued in each chapter.

Kubey, Craig; Addlestone, David F.; O'Dell, Richard E.; Snyder, Keith D.; Stichman, Barton **F.**; and Vietnam Veterans of America, *The Viet Vet Survival Guide, How to Cut Through the Bureaucracy and Get What You Need—And Are Entitled To*. New York: Facts on File Publications, **1986**. Pages: xx, **331**. Appendices, index, **sample forms**. Price: **\$19.95**. Publisher's Address: Ballantine Books, Random House, Inc., **201 East 50th St., New York, New York 10022**.

This handbook is a step-by-step consumer guide to services available to meet the unique needs of Vietnam Veterans. It is "designed to help the Vietnam Vet figure out what he is entitled to and how to go about getting it." The book is easy to read and understand, and will be an aid to Vietnam Veterans and those who desire to work with them to obtain their entitlements. Particular emphasis is given to dealing with the Veterans Administration, and where to go for help, including lists of organizations, people, and publications.

Included are an in-depth coverage of the Agent Orange issue and chapters on Overpayments by VA, Pensions, Medical Services, Psychological Readjustment, Employment (including starting a business), Education and Rehabilitation, Housing (including VA loans and foreclosures), Obtaining and Correcting Military Records, Upgrading a Discharge, Making Claims to VA and appealing if turned down.

War Crimes, War Criminals, and War Crimes Trials: An Annotated Bibliography and Source Book, ed. Norman **E.** Tutorow. Westport, Connecticut: Greenwood Press, **1986**. Pages xx, **548**. Abbreviations; glossary; journals and other periodical literature consulted; index of authors, subjects, and topics. Price: **\$65.00** Publisher's address: Greenwood Press, 88 Post Road West, Westport, Connecticut **06881**.

This bibliography does not purport to be an exhaustive compilation of publications on war crimes, war criminals, and war crimes trials. There are thousands more English-language works that could be added, not to mention thousands of U.S. government documents. Just as many accessible research materials are available in the archives of Belgium, Great Britain, France, Germany, the Netherlands, and Poland.

The purpose of this volume, however, is to be “representative” of the vast variety of information on war crimes, war criminals, and war crimes trials. In that regard, the book serves rather well. By arranging in logical order the major works and documents, this bibliography opens the door for the researcher to pursue other sources.

With annotations for the major publications, the author gives a survey of his sources, lists early war crimes trials, and deals with **all** aspects of World War II war crimes. Two sections put special emphasis on the Holocaust and on concentration camps: The latter part of the book includes material on the **1961** trial of Adolph Eichmann in Jerusalem, the Vietnam War, and the “International War Crimes Tribunal” founded by Bertrand Russell.

The **4500** references in the bibliography include monographs, government documents, dissertations, and periodical articles. The appendix contains the text of the London agreement for the prosecution and punishment of the major war criminals of the European Axis as well as the Charter of the Nuremberg International Military Tribunal. The appendix also lists the IMT defendants and their defense counsels, and names **all** the Allied prosecution teams.

The bibliography is well-balanced. It includes revisionist works, and works that question the legal and ethical basis for the victors to try the vanquished.

An Annotated Bibliography of U.S. Marine Corps History, ed. Paolo E. Coletta. Lanham, Maryland University Press of America, Inc., **1986**. Pages xiii, **417**. Abbreviations, author index, subject index. Price: **\$37.50** Publisher's address: University Press of America, Inc., **4720** Boston Way, Lanham, Maryland **20706**.

This comprehensive list of **3,917** titles deals not only with strictly Marine Corps matters, but also gives appropriate attention to diplomatic, maritime, naval, military, aviation, geographical, political, economic, social, intellectual, scientific, technological, organizational, administrative, and personal history relevant to the Marine Corps.

The extensive space devoted to personal papers and to transcripts of oral interviews enhance the human aspect of Marine **Corps** history. The volume also lists selected bibliographical aids and reference books to aid the researcher. A chapter on “Special Subjects” includes Ceremonies and Drills, Decorations and

Awards, Minorities, Music, Religion, Uniforms and Insignia, Women Marines, Marine Wives and Widows, and Giants of the *corps*.

Of special aid to the researcher is the provision of library call numbers for books, which obviates the inconvenience of traveling to and from the card catalog.

Reid, Pat, Major, and Michael, Maurice, *Prisoner of War*. New York: Beaufort Books, 1984. Pages: 192. Photographs, index, bibliography. Price: \$17.95. Publisher's address: Beaufort Books Publishers, 9 E. 40th St., New York, New York 10016.

The author was an officer in the British Expeditionary Force in World War II and became a prisoner of war in Germany from 1940-42 before escaping to Switzerland.

Prisoner of War is a history of the treatment, psychology, and lives of prisoners of war from the ancient world to the present. Major Reid contrasts the historical differences in treatment of prisoners of war in the Far East and Russia with their treatment in the West. Many photographs of prisoners of war, their quotes, and their wartime journal entries are incorporated throughout the book to aid the reader's understanding of the subject.

The author points out that it is easier to provide humane treatment for smaller groups than for larger groups of prisoners of war. He expresses concern that, with the current requirements under international conventions for the treatment of prisoners of war, the next war, if there is one, may find some armies not giving quarter and not accepting surrender.

Major Reid provides a very readable, but, at times, quite disturbing discussion of prisoner of war issues. Every military attorney should become familiar with his viewpoint. The problems and questions the author raises are identical to those that military practitioners will continually face when providing operational law support to soldiers and their commanders.

Biological and Toxin Weapons Today, ed. Erhard Geissler. New York: Oxford University Press, 1986. Pages: xii, 207. Glossary, references, index. Price: \$38.00. Publisher's address: Oxford University Press, 200 Madison Avenue, New York, New York 10016.

This book was compiled in anticipation of the second Review Conference of the Biological Weapons Convention in Geneva in September 1986. The chief author is Dr. Erhard Geissler, who agreed to take responsibility for the book with the Stockholm

International Peace Research Institute, a Swedish disarmament organization.

The book raises a number of important issues. The introduction of genetic engineering, protein engineering, and other biotechnologies has made possible the development of new biological warfare and toxin warfare agents. Thus, the potential for the development and use of biological warfare and toxin warfare agents has increased dramatically. In addition, problems of definitions in the international negotiation process continue to occur: toxin warfare agents are often mistakenly considered to be biological weapons, and definitions of biological warfare occasionally include toxin warfare agents. One chapter raises the problems inherent in the verification of biological and toxin weapons treaties.

In the final chapter, the authors and a number of other eminent scientists from both East and West endorse an agreed set of conclusions and recommendations for consideration by the parties to the Biological Weapons Convention. The book should be of interest to anyone involved in science policy or armament/disarmament issues.

Yearbook on Socialist Legal Systems. 1986, ed. W.E. Butler. Dobbs Ferry, New York Transnational Publishers, Inc., 1986. Pages ix, 209. Price: \$67.00. Publisher's address: Transnational Publishers, Inc., P.O. Box 7282, Ardsley-on-Hudson, New York 10503.

This compilation of legal writings from various Eastern Bloc law professors purports to serve the cause of comparative legal analysis. Its contributors include P. Cosmovici of the University of Bucharest, M. Deszo of the Hungarian Academy of Sciences, S.A. Ivanov of the U.S.S.R. Academy of Sciences, and seven faculty members from Warsaw University.

It is difficult to take seriously a "legal" study that contains passages such as this one, regarding the Russian occupation of Poland:

The liberation of the country by the Red Army and the Polish People's Army created during 1943 in the Soviet Union made it impossible for the London-based Polish authorities to govern. It also meant a change of type of State and form of administration.

Initially after the war in Poland, just as in the other people's democracies, the democratic structural approaches of an earlier time were reinstated. . . The

political and legal transformations made in Poland after World War II, particularly after 1948, were consolidated in the Constitution of 22 July 1952, still in force as amended to this day. The most important legal and political structural changes in this Constitution were the rejection of Montesquieu's concept of separation of powers and its replacement by the concept of unified State power and, among others, total transformation of the national economy (nationalization) and a reform of the structure of territorial administration. [pp. 60-61].

These essays mainly serve to justify the existence of totalitarian systems, not to further the aims of international and comparative legal studies.

***Soviet Generals Recall World War II*, ed. Igor Vitukhin. New York: Sphinx Press, Inc., 1981. Pages xvi, 413. Illustrations. Price: \$15.95 Publisher's address: Sphinx Press, Inc., 59 Boston Post Road, P.O. Box 1524, Madison, Connecticut 06443-1524.**

The "Great Patriotic War" continues to be central to the Russian psyche, and this book should be read, if for no other reason than to gain an insight into that psyche. The book delivers what the title promises; the memoirs set forth the story of the war as told by the Soviet generals who had worked out the plans for the military operations and were in charge of carrying them out.

The accounts are limited to the decisive main stages of the war years: the battle for Moscow, the now legendary Stalingrad battle, the 900-day blockade of Leningrad, the battle of Kursk, the "liberation" of Europe, the storming of Berlin, and finally, the defeat of Japan. Authors include Zhukov, Vasilevsky, and Konev.

The memoirs for the most part are exciting and informative. Unfortunately, they are pervaded by a tiresome propagandistic style, and are interspersed with pointless radio broadcasts by Stalin and Molotov.

Gray, Colin S., *Maritime Strategy, Geopolitics, and the Defense of the West*. New York: Ramapo Press, 1986. Pages viii, 85. Price: \$8.95. Publisher's address: Ramapo Press, 363 Seventh Avenue, New York, New York 10001.

This treatise is a follow-up to the author's best selling 1977 book, *The Geopolitics of the Nuclear Era*. The new work succeeds in updating our strategic maps with refined coordinates and new

dimensions. It illustrates the landpower-seapower contest that underlies the Soviet-American postwar rivalry, and analyzes the current defense debate between advocates of "maritime strategy" and supporters of a "coalition defense."

Policy-makers have a tendency to **miss** the importance to Western defense of obscure choke points like the Strait of Hormuz or the Yucatan Channel, although the latter may have more bearing on ultimate victory in global war than all the glamorous weapons systems. Military power must inevitably be projected through, across, or around intractable geography.

The author maintains that the United States, as the leader of a multilateral naval alliance, must gain control of the world's oceans in order to prosecute any feasible allied defense design on land. He also emphasizes that seapower can be decisive only in conjunction with continental defense, which saps the main strength of a landpower enemy.

Overall, Dr. Gray's roadmap of modern geopolitics succeeds in demonstrating the true synergy of land, sea, and aerospace capabilities in a defensive strategy for the West.

Larson, Joyce E. and Bodie, William C., *The Intelligent Layperson's Guide to 'Star Wars.'* New York The National Strategy Information Center, Inc., **1986**. Pages: **xix, 59**. Illustrations, Glossary, Further Reading List. Price: **\$6.95**. Publisher's address: The National Strategy Information Center, Inc., **150 E. 58th St., New York, New York 10155**.

This concise handbook deals with the major issues surrounding the Strategic Defense Initiative (SDI), or "Star Wars." It contains **16** essays in question-and-answer form covering the most commonly asked questions about SDI.

The *Guide* does not have an in-depth discussion of the myriad issues that the Strategic Defense Initiative has raised. Readers familiar with SDI will find the treatment too elementary. Those who have no background in the area, however, will find a good overview of this complex subject.

Although the National Strategy Information Center, Inc., the publisher, "espouses no political causes," this handbook clearly leans toward supporting the SDI.

Langer, Peter H., *Transatlantic Discord and NATO's Crisis of Cohesion.* Washington, D.C.: Institute For Foreign Policy Analysis, Inc., **1986**. Pages: **viii, 94**. Price: **\$9.95**. Publisher's address:

Pergamon Press, Maxwell House, Fairview Park, Elmsford, New York 10523.

This book analyses the internal and external pressures that are threatening the NATO alliance. It examines political, psychological, structural, and cultural factors that are affecting the unity and purpose of the alliance. The author also points to "silver linings" in NATO's storm clouds.

Particular attention is given to the nuclear debate, East-West political relations, burden sharing between the allies, and discord over out-of-area issues, particularly in Latin America.

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